

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SCOTT REIMER, individually and on behalf of all
others similarly situated,

Plaintiff,

- against -

AMBAC FINANCIAL GROUP INC., ROBERT J.
GENADER, PHILLIP B. LASSITER, SEAN T.
LEONARD and THOMAS J. GANDOLFO,

Defendants.

MARKO BABIC, individually and on behalf of all
others similarly situated,

Plaintiff,

- against -

AMBAC FINANCIAL GROUP INC., ROBERT J.
GENADER, PHILLIP B. LASSITER, SEAN T.
LEONARD and THOMAS J. GANDOLFO,

Defendants.

(Captions continued on subsequent page.)

**SUPPLEMENTAL DECLARATION OF GERALD H. SILK IN FURTHER SUPPORT
OF THE MOTION OF THE U.S. PUBLIC PENSION FUNDS FOR (1) APPOINTMENT
AS LEAD PLAINTIFF; (2) APPROVAL OF THEIR SELECTION OF COUNSEL AS
LEAD COUNSEL FOR THE CLASS; AND (3) CONSOLIDATION OF ALL RELATED
ACTIONS**

KEVIN PARKER, individually and on behalf of all
others similarly situated,

Plaintiff,

- against -

AMBAC FINANCIAL GROUP INC., ROBERT J.
GENADER, PHILLIP B. LASSITER, SEAN T.
LEONARD and THOMAS J. GANDOLFO,

Defendants.

MINNEAPOLIS FIREFIGHTERS' RELIEF
ASSOCIATION, individually and on behalf of all
others similarly situated,

Plaintiff,

- against -

AMBAC FINANCIAL GROUP INC., ROBERT J. GENADER, PHILLIP B. LASSITER, SEAN T. LEONARD and THOMAS J. GANDOLFO,

Defendants.

I, Gerald H. Silk, declare as follows:

1. I am a member in good standing of the bars of the State of New York and of this Court. I am a partner in the law firm of Bernstein Litowitz Berger & Grossmann LLP. I submit this supplemental declaration in further support of the motion filed by the Public School Teachers' Pension & Retirement Fund of Chicago ("Chicago Teachers"), the Arkansas Teacher Retirement System ("Arkansas Teachers"), and the Public Employees' Retirement System of Mississippi ("Mississippi PERS," and collectively with Arkansas Teachers and Chicago Teachers, the "U.S. Public Pension Funds") for appointment as Lead Plaintiff, approval of their selection of Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") and Kaplan Fox & Kilsheimer LLP ("Kaplan Fox") to serve as Lead Counsel for the Class, and for consolidation of all related actions.

2. Attached as Exhibits A through D are true and correct copies of the following documents:

Exhibit A: *In re Rait Fin. Trust Sec. Litig.*, No. 2:07-cv-03148(LDD), slip op. (E.D. Pa. Oct. 25, 2007);

Exhibit B: Mem. in Further Support of Comninvest Asset Management GBMH's Mot., *In re Fannie Mae Sec. Litig.*, 04-cv-1639-RJL (D.D.C. Dec. 10, 2004);

Exhibit C: *In re Williams Sec. Litig.*, No. 02-CV-72-H, slip op. (N.D. Okla. Dec. 29, 2004); and

Exhibit D: Supp. to Reply Br. of Frederic E. Russell Investment Mgmt. Co., *In re Williams Sec. Litig.*, No. 02-cv-72-H, slip op. (N.D. Okla. Dec. 29, 2004).

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Executed this fourteenth day of April, 2008.

/s/ Gerald H. Silk
Gerald H. Silk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A1 CREDIT COMPANY,	:	
f/b/o EILEEN HERSKOWITZ,	:	
On Behalf of Itself and All Others	:	
Similarly Situated,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
RAIT FINANCIAL TRUST, et al.,	:	NO. 2:07 cv-03148-LDD
Defendants.	:	

ORDER

Before the court are four motions¹ for the consolidation of related cases, the appointment of lead plaintiff and the approval of lead counsel in the putative class action securities litigation against RAIT Financial Trust and various other defendants (collectively, “RAIT”). Motions have been filed by: (1) Lewis Vernekoff, New Jersey Carpenters Pension Fund and Pengsen Liu (the “LVC Group”); (2) Brahman Capital Corp. and various related investment entities (“Brahman Capital”); (3) Iron Workers Local No. 25 Pension Fund, Sonny Bhakta, and the Pistilli Family (the “Iron Workers Group”) and (4) Richard Stevens and Lance Stevens (the “Stevens Group”). Applying the detailed procedures set forth in the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), the Court orders (i) the consolidation of the various related matters; (ii) the appointment of Brahman Capital as lead plaintiff and (iii) the appointment of Bernstein Litowitz

¹The Employees’ Retirement System of the State of Rhode Island, which had also filed a motion, withdrew its motion on October 15, 2007.

Berger & Grossman LLP (“Bernstein Litowitz”) as lead counsel.

I. Facts

This case and eight other related matters were filed on behalf of investors who purchased securities of RAIT Financial Trust between June 8, 2006 through and including July 31, 2007.² These cases arise out of alleged violations of the federal securities laws, including Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”). The plaintiffs claim that during the previously mentioned dates the defendants caused RAIT’s stock price to be artificially inflated by making false and misleading statements to the investing public and by failing to disclose material facts related its exposure to American Home Mortgage (“AHM”).

II. Discussion

A. Motions to Consolidate

All movants in this case have filed motions requesting that the various matters related to alleged securities law violations by RAIT be consolidated. These motions are unopposed.

Rule 42(a) of the Federal Rules of Civil Procedure provides “[w]hen actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Fed. R. Civ. P. 42(a). “A court has broad discretion to consolidate actions involving common questions of law or fact for trial or pretrial purposes if it will facilitate the administration of justice.” Smithkline Beecham Corp. v. Geneva Pharm, Inc., No. 99-CV-2926 et al., 2001 WL 1249694, at *5 (E.D. Pa. Sept. 26, 2001). Moreover, the PSLRA

² For the purpose of adjudicating these motions, we assume, without finding, that June 8, 2006 through and including July 31, 2007 is the relevant class period.

directs that cases should be consolidated when there is “more than one action on behalf of a class asserting substantially the same claim or claims.” 15 U.S.C. § 78u-4(a)(3)(B)(ii).

Based on the allegations in the complaints, the related matters share significant common issues of law and fact. All the matters allege violations of Section 10(b) and 20(a) of the Exchange Act and Securities and Exchange Commission (“SEC”) Rule 10b-5.³ Furthermore, all the claims in these matters arise from the same set of operative facts related to RAIT’s disclosure with respect to its exposure to AHM. Consequently, because the consolidation of the various related actions will facilitate the administration of justice and promote judicial economy without any foreseeable prejudice, the motion to consolidate filed by Brahman Capital is granted.

B. Motions to Appoint Lead Plaintiff

Having determined that consolidation is appropriate, the PSLRA directs that the court “appoint the most adequate plaintiff as lead plaintiff for the consolidated actions.” 15 U.S.C. § 78u-4(a)(3)(B)(ii). Section 78u-4(b) provides that:

the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that—
 (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
 (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Based upon the motions submitted by the movants and their presentations at oral argument, this Court finds that Brahman Capital is entitled to the

³ Though the complaints filed by the A1 Credit Company and Theona B. Salkowitz, Case Nos. 2:07-cv-03148-LDD and 2:07-cv-03406-LD, respectively, allege additional violations under the Securities Act of 1933, the common issues of law among the cases predominate.

presumption that it is most adequate plaintiff.

1. Motion in Response to Notice

Brahman Capital timely filed its motion to act as lead plaintiff on October 1, 2007. This motion contained the sworn certifications required by 15 U.S.C. § 78u-4(a)(2). Additionally, the notice to members of the purported class, upon which Brahman Capital relies, was timely and adequate.

2. Largest Financial Interest

To determine the largest financial interest, the court looks to “(1) the number of shares that the movant purchased during the putative class period; (2) the total net funds expended by the plaintiffs during the class period; and (3) the approximate losses suffered by the plaintiffs.” In re Cendant Corp. Litig., 264 F.3d 201, 262 (3d Cir. 2001). Brahman Capital’s submissions indicate that from June 8, 2006 through July 31, 2007, Brahman Capital purchased 1,457,600 net shares of RAIT stocks, this represented a net expenditure of \$50,341,314.58 and an approximate loss of \$36,578,824.13. Based on the submission of the other movants, it is clear that Brahman Capital has the largest financial interest in the lawsuit.

 3. Requirements of Rule 23

The final inquiry requires the Court to determine that Brahman Capital has made a *prima facie* showing that “the claims or defenses of [Brahman Capital] are typical of the claims or defenses of the class, and [Brahman Capital] will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a); Cendant, 264 F.3d at 263 (discussing need of movant to only make a *prima facie* showing).

a. Typical Claims

With respect to typicality, the inquiry is “whether the circumstances of the movant with the largest losses are markedly different or the legal theory upon which the claims [of that movant] are based differ[] from that upon which the claims of other class members will perform be based.” Cendant, 264 F.3d at 265. (internal citations and quotations omitted). Brahman Capital’s circumstances and legal claims are similar to the claims of the other plaintiffs. The claims and injuries of Brahman Capital, like those of the other plaintiffs, arise from the same alleged misconduct by RAIT (i.e. its failure to properly disclose its exposure to AHM). Furthermore, its legal claims, like those of the other plaintiffs, set forth violations of the federal securities laws, namely the Exchange Act.

b. Adequately Protect

In determining adequacy, the question is whether the movant “has the ability and incentive to represent the claims of the class vigorously, [whether it] has obtained adequate counsel, and [whether] there is [a] conflict between [the movant's] claims and those asserted on behalf of the class.” Id. (citing Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir.1988)). Brahman Capital, an institutional investor that has alleged significant losses, is the type of plaintiff that has both the ability and incentive to vigorously pursue the claims of the class. This analysis is consistent with the legislative history of the PSLRA that notes “[i]nstitutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake. The claims of both types of class members generally will be typical.” H.R. Conf. Rep. 104-327, at 34 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 737. In addition, Brahman Capital’s choice of an experience class-action securities law firm as lead counsel supports the finding of Brahman Capital’s adequacy.

Furthermore, based on Brahman Capital's submissions,⁴ there is no indication that there is a conflict between the claims to be asserted by Brahman Capital and the rest of the class.

Accordingly, for the reasons set forth above, the Court finds that Brahman Capital satisfies the requirements of 15 U.S.C. § 78u-4(a)(3)(B)(iii) and, consequently, is entitled to the presumption that it is the most adequate plaintiff.

4. Rebutting the Presumption

This presumption, however, may be rebutted “upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff will not fairly and adequately protect the interest of the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). In considering objections by putative lead plaintiffs “the question is not whether another movant might do a better job of protecting the interests of the class than the presumptive lead plaintiff; instead, the question is whether anyone can prove that the presumptive lead plaintiff will not do a ‘fair[] and adequate []’ job.”

Cendant, 264 F.3d at 268.

Here, the Iron Workers Group contends that Brahman Capital would not fairly and adequately protect the interest of the class because it has an interest that conflicts with those of other class members. Specifically, the Iron Workers Group notes that in a registration statement filed on Form S-3 by Atlas Pipeline Partners, L.P. (“Atlas”), Brahman Capital is listed as a selling unitholder. Furthermore, the Iron Workers Group contends that Atlas is a partnership whose founder, chief executive officer and chairman, Edward Cohen, is (a) the husband Betsy

⁴In determining, whether a movant is entitled to the rebuttable presumption set forth in 15 U.S.C. § 78u-4, a court only focuses on the materials provided by the movant. Objections to the adequacy of any movant by another putative lead plaintiff are only evaluated by a court in determining whether the presumption has been rebutted. See Cendant, 264 F.3d at 264.

Cohen, the chairman, trustee, and until January 2006 chief executive officer of RAIT, and (b) the father to Daniel Cohen, the chief executive offer of RAIT from January 2006. Both Betsy Cohen and Daniel Cohen are defendants in this matter. Additionally, the Iron Workers Group alleges that Jonathan. Cohen, son of Edward and Betsy Cohen is a vice-chairman of Atlas as well as an officer and director of RAIT. Accordingly, the Iron Workers Group contend that because of the close affiliation of Brahman Capital with the interests of the Cohen family and its interest in Atlas, which exceed \$40 million, Brahman Capital has a conflict that disqualifies it from acting as lead plaintiff.

Although the Iron Workers Groups' allegations do indicate a potential conflict of interest, the alleged conflict is insufficient to rebut the presumption that the Brahman Capital is the most adequate plaintiff. In In re Cendant Corp. Litigation, the Third Circuit held that the lead plaintiff, who held a substantial investment in the defendant corporation during the litigation, was not disqualified from as acting as lead plaintiff. Id. at 244. The Third Circuit reasoned that by establishing a preference for institutional investors, who often hold a large stake in defendant corporations prior and during litigation, Congress "must have thought that the situation present here does not inherently create an unacceptable conflict of interest." Id. Applying this principle to the present conflict, the existence of a financial interest by Brahman Capital in a non-defendant corporation is clearly not sufficient to rebut the presumption that Brahman Capital is the most adequate plaintiff. Furthermore, neither the alleged familial relationship between the principals of RAIT and Atlas nor the potential negative economic consequence to Brahman Capital's financial interest in Atlas are sufficiently substantial enough to support the disqualification of Brahman Capital.

C. Motions to Appoint Lead Counsel

The PSLRA states that “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The PSLRA “evidences a strong presumption in favor of approving a properly-selected lead plaintiff’s decisions as to counsel selection and counsel retention.” Cendant, 264 F.3d at 276. Accordingly, it is not a court’s responsibility to make the choice itself, but rather to employ a deferential standard and determine whether judicial intervention is “necessary to protect the interest of the plaintiff class.” Id. Applying this standard, Brahman Capital’s choice of Bernstein Litowitz as lead counsel is reasonable. Based upon Bernstein Litowitz resume and its history of prosecuting various large securities class actions, including In re Cendant Corp. Litigation, Brahman Capital’s choice of Bernstein Litowitz, is reasonable.

Accordingly, this 25th of October 2007, upon consideration of the motions, briefs and oral arguments presented by the various movants in this matter and for the reasons set forth above, the following is hereby ORDERED:

1. Iron Workers Local No. 25 Pension Fund, Sonny Bhakta and the Pistilli Family’s Motion for Consolidation, Appointment as Lead Plaintiff and to Approve Lead Plaintiff’s Selection of Counsel (Doc. No. 8) is DENIED; Stevens Group’s Motion to Consolidate Related Cases, For Appointment of Lead Plaintiff and for Approval of Its Choice of Counsel as Lead and Liaison Counsel for the Class (Doc. No. 9) is DENIED; Motion of Employees’ Retirement System of the State of Rhode Island for Consolidation of the Related Actions, Appointment as Lead Plaintiff, and for Approval of Its Selection of Lead Counsel (Doc. No. 10) is DENIED; Motion of the LVC Group for Consolidation, for Their Appointment as Lead Plaintiff and for Approval of Lead Plaintiffs’ Selection of Co-Lead Counsel (Doc. No. 12) is DENIED and Motion of Brahman Capital Corporation for Appointment as Lead Plaintiff, Approval of Its Selection of Counsel as Lead Counsel for the Class, and Consolidation of all Related Cases (Doc. No. 13) is GRANTED.
2. The Court hereby consolidates the following matters Civil Action Nos. 07-3236, 07-3405, 07-3406, 07-3478, 07-3497, 07-3551, 07-3574 and 07-3831 for all purposes including,

but not limited to, discovery, pre-trial proceedings and trial proceedings, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure under the following caption:

IN RE RAIT FINANCIAL TRUST	:	Master File
SECURITIES LITIGATION	:	No 2:07-cv-03148-LDD
	:	

3. The Clerk of the Court is directed to close Civil Action Nos. 07-3236, 07-3405, 07-3406, 07-3478, 07-3497, 07-3551, 07-3574 and 07-3831 for statistical purposes.
4. Each new case that arises out of the subject matter of the consolidated action which is filed in this Court or transferred to this Court, shall be consolidated with the consolidated action and this Order shall apply thereto, unless a party object to the consolidation, as provided for herein, or any provision of this Order, within (10) days after the date upon which a copy of this Order is served on counsel for such party, by filing an application for relief and this Court deems it appropriate to grant such application. Nothing in the foregoing shall be construed as a waiver of defendant's right to object to consolidation of any subsequently-filed or transferred related action.
5. Brahman Capital is APPOINTED to serve as lead plaintiff.
6. Brahman Capital's selection of lead counsel is APPROVED, and Bernstein Litowitz Berger & Grossman LLP is APPOINTED as lead counsel for the class.
7. Lead counsel shall file consolidated amended complaint by no later than November 26, 2007 and shall serve this consolidated amended complaint on defendants no later than December 17, 2007.
8. Lead counsel shall have the following responsibilities and duties, to be carried out either personally or through counsel whom lead counsel shall designate:
 - a. to coordinate the briefing and argument of motions;
 - b. to coordinate the conduct of discovery proceedings;
 - c. to coordinate the examination of witnesses in depositions;
 - d. to coordinate the selection of counsel to act as spokesperson at pretrial conferences;
 - e. to call meetings of plaintiffs' counsel as they deem necessary and appropriate from time to time;
 - f. to coordinate all settlement negotiations with counsel for defendants;
 - g. to coordinate and direct the pretrial discovery proceedings and the preparations for trial and the trial of this matter and to delegate work responsibilities to selected counsel as may be required; and
 - h. to supervise any other matters concerning the prosecution, resolution or

settlement of the consolidated action.

9. No motion, request for discovery, or other pretrial proceeding shall be initiated or filed by any plaintiff without the approval of lead counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of lead counsel.
10. Lead counsel shall have the responsibility of receiving and disseminating the Court's orders and notices.
11. Lead counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokesperson for plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel.

BY THE COURT:

/S/LEGROME D. DAVIS

Legrome D. Davis, J.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

VINCENT VINCI, individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)

v.)

Civil Action No. 1:04-CV-1639 (RJL)

FEDERAL NATIONAL MORTGAGE)
ASSOCIATION (*operating as Fannie*)
Mae), FRANKLIN RAINES, J. TIMOTHY)
HOWARD, and LEANNE G. SPENCER,)
)
Defendants.)

ANNE E. FLYNN and ROBERT L.)
GARBER, *as Custodian for Michael Saul*)
Garber, UTMA-PA, individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)

v.)

Civil Action No. 1:04-CV-1843 (RJL)

FANNIE MAE (*f/k/a Federal National*)
Home Loan Mortgage Corporation), J.)
TIMOTHY HOWARD, FRANKLIN D.)
RAINES, and DANIEL H. MUDD,)
)
Defendants.)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF COMINVEST ASSET
MANAGEMENT GMBH'S MOTION TO CONSOLIDATE ACTIONS,
TO BE APPOINTED LEAD PLAINTIFF AND FOR APPROVAL OF
LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL AND LIAISON COUNSEL,
AND IN OPPOSITION TO COMPETING LEAD PLAINTIFF MOTIONS

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

VINCENT VINCI, individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)

v.)

Civil Action No. 1:04-CV-1639 (RJL)

FEDERAL NATIONAL MORTGAGE)
ASSOCIATION (*operating as Fannie*)
Mae), FRANKLIN RAINES, J. TIMOTHY)
HOWARD, and LEANNE G. SPENCER,)
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Defendants.)

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GARBER, *as Custodian for Michael Saul*)
Garber, UTMA-PA, individually and on)
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Civil Action No. 1:04-CV-1843 (RJL)

FANNIE MAE (*f/k/a Federal National*)
Home Loan Mortgage Corporation), J.)
TIMOTHY HOWARD, FRANKLIN D.)
RAINES, and DANIEL H. MUDD,)
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Defendants.)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF COMINVEST ASSET
MANAGEMENT GMBH'S MOTION TO CONSOLIDATE ACTIONS,
TO BE APPOINTED LEAD PLAINTIFF AND FOR APPROVAL OF
LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL AND LIAISON COUNSEL,
AND IN OPPOSITION TO COMPETING LEAD PLAINTIFF MOTIONS

Proposed lead plaintiff Cominvest Asset Management GmbH ("Cominvest") respectfully

submits this Memorandum of Law in further support of its motion to consolidate actions, for appointment as lead plaintiff and for approval of its selection of lead counsel and liaison counsel, and in opposition to the motions for appointment as lead plaintiffs submitted by (i) Ohio Public Employees Retirement System (“OPERS”), State Teachers Retirement System of Ohio (“STRS”) and Ohio Bureau of Workers’ Compensation (“BWC”) (collectively, “Ohio”); and (ii) Cafco-Large Cap Funds, L.P. and Jeff Pechan (collectively, the “Cafco Pechan Movants”).

INTRODUCTION

Ohio’s allegations of “loss” in this action cannot be substantiated. Specifically, Ohio *claims* that it suffered losses of “approximately \$38 million” in this action. The truth is that Ohio’s financial interest is closer to \$2.6 million. *See, infra*, § II.B.1-2; Exhibit A (Affidavit of Richard Higgins at Exhibit RSH-6) to Charrow Decl. 2.¹ The Cafco Pechan Movants claim collective losses of \$265,139. Because Cominvest has suffered losses exceeding \$4.3 million as a direct result of Class Period investments in Federal National Mortgage Association (“Fannie Mae”) (*see* Exhibits A and C to Charrow Decl.²), Cominvest has the largest financial interest in the outcome of this litigation.

All movants recognize the mandatory criteria of the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.), in governing how district courts select lead plaintiff. The

¹ Declaration of Robert P. Charrow In Further Support Of Cominvest Asset Management GmbH’s Motion To Consolidate Actions, To Be Appointed Lead Plaintiff And For Approval Of Lead Plaintiff’s Selection Of Lead Counsel And Liaison Counsel, and In Opposition To Competing Lead Plaintiff Motions (“Charrow Decl. 2”).

² Declaration Of Robert P. Charrow In Support Of Motion Of Cominvest Asset Management GmbH To Consolidate Actions, To Be Appointed Lead Plaintiff and For Approval of Lead Plaintiff’s Selection of Lead Counsel and Liaison Counsel (“Charrow Decl.”).

PSLRA is quite straightforward. District courts must appoint as lead plaintiff the movant with the largest financial interest in the outcome of the litigation that otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”). *See* 15 U.S.C. §78u-4(a)(3)(B).

Ohio’s papers in support of its petition to serve as lead plaintiff are inaccurate in several significant ways. First, Ohio deviated from the standard method for calculating out-of-pocket losses, including the way Ohio has calculated its own losses in the past. Second, Ohio, instead of applying the set-off price mandated by the PSLRA for valuing shares retained at the end of the Class Period, hand-picked a set-off price of \$63.40 – the lowest price Fannie Mae stock reached between September 23, 2004 and November 22, 2004. This served to inflate Ohio’s purported out-of-pocket losses, which all movants agree is determinative of one’s financial interest.

Plaintiffs and courts everywhere compare out-of-pocket financial losses which are *always* computed by netting total costs from Class Period purchases and total proceeds from Class Period sales, and then subtracting the total value of shares retained at the end of the Class Period using a statutory set-off price mandated in the PSLRA (*see* 15 U.S.C. §78u-4(e)(1)). Cominvest and the Cafco Pechan Movants calculated their financial losses in precisely this manner. Ohio, at least in this case, did not. Instead, Ohio ignored all gains it enjoyed on shares purchased during the Class Period (via a corresponding sale or set-off).^{/3} Thus, the purported losses Ohio represents for its three funds are grossly inaccurate.

Ohio also has disregarded the PSLRA’s requirement that plaintiffs apply a prescribed set-

^{/3} In order to present actual out-of-pocket losses – which serve as the standard measuring stick – it is both logical and necessary to offset total costs with total gains. *See* Exhibits A (Declaration of Richard Higgins) and B (Declaration of David Fuller) to Charrow Decl. 2

off price to determine the value of shares retained at the end of the Class Period. Under the PSLRA, the proper set-off price for valuing retained shares is “the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.” 15 U.S.C. §78u-4(e)(1). Consistent with this requirement, Cominvest and the Cafco Pechan Movants applied essentially the same statutory mean trading price to set-off retained shares. Ohio, in contrast, chose as its set-off price the lowest price at which Fannie Mae common stock traded during the applicable 90-day period. By selecting *the lowest price*, rather than “*the mean trading price*,” Ohio greatly lowered the value of its retained shares, thereby inflating its losses.

Ohio’s methods of ascertaining its losses in this case is inconsistent with Ohio’s past practices in other cases where¹⁴ Ohio calculated its financial losses correctly, in the precise manner that Cominvest and the Cafco Pechan Movants calculated losses here. *See* Exhibit C to Charrow Decl. 2. More specifically, in the *Shell Case*, Ohio netted its total costs from class period purchases with all proceeds, including all gains, from shares sold during the class period and shares retained at the end of the class period. *See Id.* Ohio also managed in the *Shell Case* to properly compute and apply the correct PSLRA set-off price for valuing shares retained at the close of the class period. *See Id.*

Apart from the sheer magnitude of Ohio’s miscalculations and the credibility questions raised by this fact alone, an overwhelming number of Ohio’s Fannie Mae stock transactions fall outside the applicable trading ranges for certain days or did not occur on trading days. *See, infra*,

¹⁴ *In re: Royal Dutch/Shell Transport Securities Litigation*, Civ. No: 04-cv-374 (D.N.J. Jan. 29, 2004) (“*Shell Case*”).

§ II.B.3. Ohio's lead plaintiff petition is such that the grounds for this Court to reject it, both legally and factually, are compelling.

In contrast to Ohio, Cominvest, a sophisticated mutual fund manager which purchased a significant number of shares in Fannie Mae stock during the Class Period, has accurately demonstrated that it has the largest financial interest and has sufficiently satisfied its burden at this juncture of satisfying all requirements of Rule 23. In support of its timely lead plaintiff motion, Cominvest has executed a certification which accurately details its Class Period transactions in Fannie Mae as well as its desire to serve in a representative capacity. Furthermore, Cominvest has selected and retained competent and experienced counsel to represent it and the class. Accordingly, Cominvest is the presumptive most adequate plaintiff and should be appointed as lead plaintiff.

PROCEDURAL HISTORY

On September 23, 2004, the first putative class action complaint – *Vinci v. Federal National Mortgage Association*, No. 04-CV-1639 (D.D.C. Sept. 23, 2004) (RJL) (“*Vinci Action*”) – alleging violations of federal securities laws by Fannie Mae, Franklin Raines, J. Timothy Howard, and Leanne G. Spencer (collectively, “Fannie Mae Defendants”) was filed in this District and assigned to this Court. Subsequently, nine putative class action complaints were filed in the District and assigned to Your Honor. In all, ten related securities class actions were filed in this District, asserting similar allegations against the Fannie Mae Defendants, with class periods ranging from January 13, 2000 through September 22, 2004, inclusive (collectively, “DC

Cases”).¹⁵ The law firm of Cohen Milstein Hausfeld & Toll, P.L.L.C. (“Cohen Milstein”) – Ohio’s proposed “Local Counsel” – filed each of the DC Cases as local counsel.

On November 22, 2004, in compliance with notice issued pursuant to the PSLRA, Cominvest, Ohio and the Cafco Pechan Movants each filed motions with this Court seeking their appointment as lead plaintiff and approval of their selection of lead counsel.¹⁶ On November 30, 2004, this Court conducted a status conference (“Status Conference”) at which the parties discussed matters including, consolidation, lead plaintiff and general management of the various cases.

At the Status Conference, the parties agreed that consolidation of the DC Cases was appropriate and indicated their intention to stipulate to consolidation.¹⁷ The parties also discussed during the Status Conference some jurisdiction issues and it became apparent that Ohio, through its counsel, believes that the actions against Fannie Mae should all be transferred to the Southern District of Ohio. *See* Hearing Transcript from November 30, 2004 Status Conference (attached as Exhibit D to Charrow Decl. 2), Record at 42, In. 21 (“the case belongs in Ohio”). On the heels of this statement, on December 3, 2004, Cohen Milstein filed Notices of Voluntary Dismissals for all, except the *Vinci* Action, of the DC Cases. One action, *Flynn and Garber v. Federal National Mortgage Association, et al.*, No. 04-CV-1843 (RJL) (“*Flynn*

¹⁵ Moreover, two similar complaints were filed in the Southern District of New York and one in the Southern District of Ohio.

¹⁶ Additionally, Cominvest and Ohio each filed a lead plaintiff motion in the Southern District of New York; Ohio filed a lead plaintiff motion in the Southern District of Ohio.

¹⁷ The parties have indeed stipulated to consolidation of the DC Cases (still pending) and are submitting a Stipulation.

Action”), appears to have been dismissed without authorization. Indeed, the *Flynn* Action had been filed by the Law Office of Alfred G. Yates Jr., P.C. (counsel for the Cafco Pechan Movants). The dismissal of the *Flynn* Action has since been withdrawn.

ARGUMENT

I. The PSLRA Prescribes The Grounds For Lead Plaintiff Selection

PSLRA Section 21D provides that, in securities class actions, courts “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.” 15 U.S.C. §78u-

4(a)(3)(B)(i). In selecting the “most adequate plaintiff,” the PSLRA requires that:

[T]he court **shall** adopt a presumption that the most adequate plaintiff . . . is the person or group of persons that –

- (aa) has either filed the complaint or made a motion in response to a notice ...;
- (bb) in the determination of the court, has **the largest financial interest** in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (emphasis added). The Ninth Circuit, one of the only appellate courts to address the PSLRA’s lead plaintiff provisions, has held:

[T]he district court must compare the financial stakes of the various plaintiffs and determine which one has the most to gain from the lawsuit. It must then focus its attention on *that* plaintiff and determine, based on the information he has provided in his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular those of “typicality” and “adequacy.” If the plaintiff with the largest financial stake in the controversy provides information that satisfies these requirements, he becomes the presumptively most adequate plaintiff.

In re Cavanaugh, 306 F.3d 726, 730 (9th Cir. 2002).

II. Cominvest Is The Presumptive Most Adequate Lead Plaintiff

As detailed herein, only Cominvest can accurately claim to have the largest financial interest in this litigation. Accordingly, the remainder of this Court's analysis pertaining to identifying the most adequate plaintiff must focus only on whether Cominvest is typical of the class it seeks to represent and whether Cominvest can provide adequate representation of the class. *Id.* Through Cominvest's opening motion, memoranda and all accompanying documents in support, Cominvest has satisfied the typicality and adequacy requirements of Rule 23. As the presumptive most adequate plaintiff, Cominvest should be appointed as lead plaintiff.

A. Cominvest Filed a Timely Lead Plaintiff Motion

In response to statutory notice issued on September 23, 2004, Cominvest selected and retained competent and experienced counsel to prepare and file, on its behalf, a motion seeking its appointment as lead plaintiff in the actions now pending in this District, the District of Columbia and the Southern District of Ohio. In support of this motion timely filed on November 22, 2004, Cominvest submitted a sworn certification detailing all of its transactions in Fannie Mae for the period between January 13, 2000 through September 22, 2004 (the "Class Period").^{/8}

As a result of its Class Period investments in Fannie Mae, Cominvest suffered losses in excess of \$4.3 million. Cominvest, through its certification and motion, has sufficiently demonstrated

^{/8} At least two actions filed in the District Court for the District of Columbia asserted claims for this period. See *Friends of the Ariel Center v. Fed. Nat'l Mortgage Ass'n*, No. 04-CV-1645 (RJL); *Flynn v. Fed. Nat'l Mortgage Ass'n*, No. 04-CV-1843 (RJL) (still pending). Furthermore, all lead plaintiff movants reference this Class Period and, accordingly, it should be utilized for determining which movant has the largest financial loss. See *In re Party City Secs. Litig.*, 189 F.R.D. 91, 94 (D.N.J. 1999) ("The Catanzarite Action is relied upon for the purposes of this motion because the class period alleged therein covers the longest class period alleged in the actions filed against the Defendants."); *Lax v. First Merchs. Acceptance Corp.*, No. 97 C 2715, 1997 U.S. Dist. LEXIS 11866, at *15-16 (N.D. Ill. Aug. 6, 1997) (Court used largest class period for the purposes of determining which movant had the largest financial interest).

its desire to seek lead plaintiff status and commitment to fulfill the important responsibilities attendant to that role.

B. Cominvest, Not Ohio, Has the Largest Financial Interest in this Litigation

The gist of the claims which all plaintiffs, including Ohio, have asserted in this action is that defendants manipulated Fannie Mae's earnings numbers. Ironically, this same theme applies to Ohio. By manipulating the method for computing out-of-pocket losses as well as applying too-low a set-off price for retained shares, Ohio has miscalculated its losses to be \$38 million. Properly computed, Ohio in truth has suffered losses of approximately \$2.6 million. *See Exhibits A (Affidavit of Richard Higgins) and B (Declaration of David Fuller) to Charrow Decl. 2.* These erroneous calculations should be viewed in the context that Ohio, earlier this year, correctly calculated and presented its out-of-pocket losses by properly recognizing all gains and by using the PSLRA set-off price to properly value retained shares. *See Exhibit C to Charrow Decl. 2.* In addition, Ohio's underlying trade information submitted in support of its lead plaintiff application appears to be unreliable. Over one million shares purportedly purchased and sold by Ohio either fell outside the applicable daily (high to low) trading range or occurred on non-trading days.

Because no movant suffered out-of-pocket losses greater than Cominvest's \$4.3 million loss, Cominvest has the largest financial interest in the outcome of this litigation.¹²

1. Ohio did not Calculate its Reported Losses Properly

The accepted method by which plaintiffs and courts alike calculate out-of-pocket losses is to net the total costs for class period purchases and the total proceeds from class period sales, *less*

the value of the shares retained at the end of the class period.^{/10} This method is straight-forward and consistent with the PSLRA, which provides a cap on recoverable damages. *See* 15 U.S.C. §78u-4(e)(1).

Nevertheless, Ohio calculated its losses in this action in such a manner that is neither logical nor supportable. Rather than offsetting all losses with all gains – as did Cominvest – Ohio completely ignored all gains from shares sold during the Class Period or retained at the end of the Class Period.^{/11} In other words, for all Ohio purchases and sales of shares during the Class Period, whenever that purchase and sale transaction resulted in a gain, Ohio computed that gain as **zero**.^{/12} For all purchases and sales resulting in a loss, Ohio included that loss in its total. Similarly, for gains from shares Ohio retained at the end of the Class Period (when set-off price for shares retained is greater than price at which shares were purchased), Ohio treated that gain as

^{/9} The Cafco Pechan Movants claim collective losses of \$265,139.

^{/10} The purpose of calculating losses in this manner is to attempt to ascertain, at this preliminary stage, a movant's out-of-pocket losses from class period transactions in a particular stock. *In re Cendant Corp. Litig.*, 264 F.3d 201, 242, n.24 (3d Cir. 2001), *cert. denied sub nom.* 535 U.S. 929 (2002) ("The proper measure of damages to reflect the loss proximately caused by the defendants' deceit is the out-of-pocket rule. That rule is the traditional measure of damages in a Rule 10b-5 action.") (internal citation omitted); *Woods v. Barnett Bank*, 765 F.2d 1004, 1013 (11th Cir. 1985) (Generally, the appropriate measure of actual damages in a Rule 10b-5 case is out-of-pocket loss); *James v. Nico Energy Corp.*, 838 F.2d 1365, 1371 (5th Cir. 1988) (holding that in a typical 10b-5 case involving defrauded buyers, recovery for damages is allowed under an out-of-pocket rule).

^{/11} Both Ohio and Cominvest employed a first-in, first-out ("FIFO") approach. Under FIFO, any shares held at the beginning of the Class Period are first offset with Class Period sales. These Class Period sales (which are matched with pre-Class Period purchases) and the resulting proceeds are not factored into a movant's total losses.

^{/12} Indeed, Ohio's loss charts submitted with its initial motion (*see* Exhibit C to Declaration of James R. Cummins) provide two result columns: "Losses (Gains) on Sales" and "Losses (Gains) on Holdings." However, whenever there are gains – and there are plenty – those gains are reflected by "0" or "–." Thus, even a cursory review of Ohio's loss charts for calculating losses reveals that, although Ohio purports to recognize gains, it does not.

zero. But when the purchase price exceeded the set-off price, resulting in a loss, Ohio included that loss total.

By definition, Ohio's purported losses are not true out-of-pocket losses since Ohio excluded all gains. *See Richardson v. MacArthur*, 451 F.2d 35, 44 (10th Cir. 1971) (holding that a plaintiff who sells a portion of stock at a profit "should not be allowed to retain this profit in silence while pleading to be made whole for his losses").^{/13} Ohio's method for calculating out-of-pocket losses is improper. By failing to take into account its trading gains, Ohio has erroneously inflated its purported losses.^{/14}

Ohio's manipulation of its losses should preclude Ohio from serving as lead plaintiff. Even more disturbing is that Ohio calculated its losses properly earlier this year in the *Shell Case*, a case in which it was also represented by Berman DeValerio Pease Tabacco Burt & Pucillo ("Berman DeValerio") (Ohio's counsel in this action). *See* Exhibit C, attached to Charrow Decl.

2 The fact that Ohio previously calculated its losses properly in the *Shell Case* (and in the same manner that Cominvest and the Cafco Pechan Movants calculate their losses in this case) militates against this Court accepting Ohio's reported losses on their face. To best illustrate how Ohio treated similar transactions differently in the *Shell Case* and in the instant case, below are excerpts from the loss charts Ohio provided in both cases:

^{/13} *See also Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 85 (2d Cir. 1980) (holding damages in an action for fraud are limited to actual losses, thus, damage computations "cannot restore a plaintiff to a better position than he would have been in if the fraud had not occurred") (internal citations omitted).

^{/14} These inflated losses are not the whole story. By applying an improper and too-low set-off price, Ohio further artificially inflated its losses. *See, infra*, § II.B.3.

FANNIE MAE**Public Employees Retirement System of Ohio (OPERS)**

PURCHASES				...	Holding Price *- \$63.30 Losses (Gains) on Holdings		
Date	Shares	Price per Share	Cost		Per Share	Shares	Losses
4/4/00	60,000	\$58.979	\$3,538,752		-\$4.42	60,000	-
11/7/00	13,900	\$75.877	\$1,054,685		\$12.48	13,900	\$173,425

State Teachers Retirement System (STRS)

PURCHASES				...	Holding Price *- \$63.30 Losses (Gains) on Holdings		
Date	Shares	Price per Share	Cost		Per Share	Shares	Losses
8/10/00	45,000	\$53.986	\$2,429,375		-\$9.41	45,000	\$0
12/7/00	8,600	\$82.000	\$705,200		\$18.60	8,600	\$159,960

State of Ohio Bureau of Workers Compensation (BWC)

PURCHASES				SALES				Losses (Gains) on Sales		
Date	Shares	Price per Share	Cost	Date	Shares	Price per Share	Proceeds	Per Share	Shares	Losses
3/17/00	38,115	\$60.79	\$2,317,087	1/24/01	38,115	\$75.18	\$2,865,448	-14.387	38,115	\$0
7/26/00	72,000	\$52.91	\$3,809,549	5/14/01	72,000	\$78.29	\$5,636,988	-25.381	72,000	\$0
6/22/01	15,000	\$86.80	\$1,301,981	7/31/02	15,000	\$73.61	\$1,104,203	13.185	15,000	\$197,778
7/17/01	20,000	\$86.30	\$1,726,034	10/22/03	20,000	\$74.03	\$1,480,614	12.271	20,000	\$245,42

SHELL CASE

Class Period: 4/8/99-1/9/04

\$48.298 PPS = Avg. Price 1/10/04-3/24/04

Public Employees Retirement System of Ohio (OPERS)

Trade Date	Transaction Type	# Shares Bought	# Shares Sold	# Shares Remaining	Price/ Share	(Cost) / Proceeds
9/28/99	Purchase	300,000		1,000,400	\$58.4126	(\$17,523,780.0000)
9/26/01	Sale		(377,095)	1,249,178		\$17,639,787.6195

State Teachers Retirement System (STRS)

Trade Date	Transaction Type	# Shares Bought	# Shares Sold	# Shares Remaining	Price/ Share	(Cost) / Proceeds
2/4/00	Purchase	141,000	1,064,900	1064,900	\$53.2903	(\$7,513,932.3000)
7/19/02	Sale		(878,357)	755,128	\$42.3301	\$37,180,939.6457

Ohio's calculation of losses in the *Shell Case* confirms that Ohio knew (and knows) that one must offset gains from losses in order accurately to show true out-of-pocket losses. Ohio would be hard-pressed to argue against the notion that netting losses **and gains** is the only rational way to accurately compute out-of-pocket losses. *See Cavanaugh*, 306 F. 3d at 730, n.4 (Courts must utilize "accounting methods that are both rational and consistently applied" in determining which movant has the largest financial interest).

2. Ohio Did Not Apply the Statutory Set-Off Price for Valuing Retained Shares

To properly measure a movant's financial interest, it is necessary to assign a value to shares which were purchased during the Class Period and retained at the end of the Class Period. Otherwise, those shares would be valued at zero while the underlying costs for their purchase

would be included in their entirety as a loss. For purposes of calculating damages, the PSLRA clearly provides that:

(e) Limitation on Damages. –

(1) In general. – . . . in any private action arising under this title in which the plaintiff seeks to establish damages by reference to the market price of a security, **the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.**

15 U.S.C. §78u-4(e).

Accordingly, the PSLRA defines how to calculate the proper set-off price for valuing shares held. *In re Williams Sec. Litig.*, Civ. No. 02-CV-72(H)M, slip op. at 9 (N.D. Okla. Jul. 8, 2002) (recognizing that 15 U.S.C. §78u-4(e) must be utilized for determining lead plaintiff's financial interest) (attached as Exhibit E to Charrow Decl. 2); *In re MicroStrategy Inc., Sec. Litig.*, 110 F. Supp. 2d 427, 433-34 (E.D. Va. 2000) (same); *Steiner v. Frankino*, No. 98-CV-0264, 1998 U.S. Dist. LEXIS 21804, at *12 (N.D. Ohio July 16, 1998) (same); *In re Party City*, 189 F.R.D. at 106 (calculating financial interest based on 15 U.S.C. §78u-4(e)). Nevertheless, while Cominvest and the Cafco Pechan Movants apply the proper PSLRA set-off value for retained shares,^{/15} Ohio uses a non-statutory, and too-low set-off price which effectively lowered the value of shares retained, thereby inflating its losses. Interestingly, rather than apply the

^{/15} Cominvest applied the PSLRA set-off of \$68.42, the mean average of Fannie Mae stock from September 23, 2004 through November 19, 2004 – the last trading day before the deadline for filing lead plaintiff motions. See Exhibit C to Charrow Decl. submitted in support of Cominvest's opening motion. Similarly, the Cafco Pechan Movants applied the PSLRA set-off of \$68.5225 – the average closing price of Fannie Mae stock between September 25, 2004 through November 19, 2004. See Exhibit C to Declaration of Alfred G. Yates, Jr. In Support of Motion of Cafco Pechan Movants For Consolidation, Appointment as Lead Plaintiffs, and For Approval of Selection

proper PSLRA set-off price, as it did in the *Shell Case*, Ohio chose a set-off price of \$63.40 – the lowest price Fannie Mae stock reached between September 23, 2004 and November 22, 2004.

See Exhibit F to Charrow Decl. 2

Because “a district court comparing movants’ losses must ensure that each movant’s loss is calculated by reference to a common settle-out price,” *In re MicroStrategy*, 110 F. Supp. 2d at 434, applying the PSLRA set-off value to Ohio’s retained shares – which it must – lowers Ohio’s losses by \$16,732,990 (Ohio’s number of retained shares, 3,346,598, times the difference in the PSLRA set-off price and the set-off price used by Ohio - \$5).

Thus, by ignoring all gains from shares sold and retained and by applying the incorrect set-off price for retained shares, Ohio has artificially inflated its total losses by over \$35 million. Ohio’s real losses as a result of its transactions in Fannie Mae are approximately \$2.6 million.

3. Ohio’s Trade Information is Unreliable

Ohio has submitted sworn certifications of its funds which purport to detail purchase and sale trades during the Class Period. However, on closer inspection, it appears that more than 1 million share transactions of Ohio fell outside the daily trading ranges on given days or, by virtue of the transaction dates provided, occurred on non-trading days, *i.e.*, weekends. For ease of reference, attached as Exhibit G to Charrow Decl. 2 is a chart which highlights the numerous trades of Ohio which appear to be inconsistent.

While Ohio may attempt to regroup and submit corrected certifications to account for these glaring inaccuracies, courts nevertheless have rejected movants whose trades and losses are proven to be unreliable. See, e.g., *In re Williams Sec. Litig.*, slip op. at 10 (“Market Street’s

of Co-Lead and Liaison Counsel.

original certification and loss calculation, unlike those of the other lead plaintiff movants, failed to provide sufficient information for the Court to analyze the basis for its claimed financial interest”); *In re MicroStrategy*, 110 F. Supp. 2d at 436 (rejecting lead plaintiff applicant because the “evidence it submitted did not permit a confident conclusion that its [own] loss was as large as it averred”); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582-83 (E.D. Pa. 2003) (noting “serious concerns with credibility” that originate from submitting faulty trading data).

C. Cominvest Has Met Its *Prima Facie* Burden Under Rule 23

Once the Court has determined which movant has the largest financial loss – in this case, Cominvest – the PSLRA next instructs that the Court focus on *that* movant to determine whether it has made a *prima facie* showing of typicality and adequacy under Rule 23. *In re Cavanaugh*, 306 F.3d at 732. This next step in lead plaintiff selection process is non-adversarial in nature, with the Court relying on the presumptive lead plaintiff’s initial filings and sworn certification. *Id.*

At this stage of the proceeding, Cominvest need only make a “preliminary showing” of typicality and adequacy. *Sofran v. Labranche*, 220 F.R.D. 398, 402 (S.D.N.Y. 2004). “In fact, a ‘wide ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left for consideration of a motion for class certification.’” *Sofran*, 220 F.R.D. at 402 (quoting *In re Party City*, 189 F.R.D. at 106).

Cominvest, a mutual fund manager based in Frankfurt, Germany, purchased 654,470 shares of Fannie Mae stock on the New York Stock Exchange. As beneficial owner of the Fannie Mae shares purchased during the relevant Class Period, Cominvest seeks to represent a class of purchasers of Fannie Mae securities which have identical, non-competing and non-

conflicting interests. Cominvest satisfies the typicality requirement because, just like all other class members, it purchased Fannie Mae stock during the Class Period, at prices allegedly artificially inflated by defendants' materially false and misleading statements and/or omissions, and suffered damages thereby. Thus, because Cominvest's claims are based on the same legal theories and arise from the same course of conduct and the same operative facts which damaged the entire class, Cominvest has satisfied the typicality requirement. *Bynum v. District of Columbia*, 217 F.R.D. 43, 47 (D.D.C. 2003).

Likewise, Cominvest is also an adequate lead plaintiff. A lead plaintiff satisfies adequacy under Rule 23 if: (1) there is no conflict between the interests of the class and the named representative; and (2) the representative is able to vigorously prosecute the interests of the class through qualified counsel. *Bynum*, 217 F.R.D. at 47. As the record reflects, Cominvest has taken significant steps to demonstrate its adequacy under Rule 23. Specifically, it has executed a certification which not only provides its Class Period transactions in Fannie Mae, but also expresses its willingness to serve as lead plaintiff and to protect the interests of the class. In response to the statutory notice issued in this action, Cominvest selected and retained competent counsel who prepared and filed a timely lead plaintiff motion on its behalf. Its counsel, attorneys at Schiffrin & Barroway, LLP and Greenberg Traurig LLP, are experienced counsel who are able to conduct this complex litigation in a professional manner. *See* Charrow Decl. at Exhibits D and E, firm biographies for both Schiffrin & Barroway, LLP and Greenberg Traurig LLP. Furthermore, Cominvest has negotiated a fee agreement with its counsel. *In re Cendant Corp. Litig.*, 264 F.3d at 265 ("[O]ne of the best ways for a court to ensure that it will fairly and adequately represent the interests of the class is to inquire whether the movant has demonstrated

a willingness and ability to select competent class counsel and to negotiate a reasonable retainer agreement with that counsel.”).

Moreover, the fact that Cominvest is a foreign institution in no way impedes its ability to serve as lead plaintiff - a point that counsel for Ohio (Berman DeValerio) is well-aware of as they have previously represented foreign lead plaintiffs with great success. *See In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 45 (D. Mass. 2001) (appointing three foreign individuals residing in Germany, Amsterdam and Italy represented by Berman DeValerio as the only lead plaintiffs).^{/16}

As the movant with the largest financial interest in this litigation and having amply demonstrated its typicality and adequacy pursuant to Rule 23, Cominvest is the presumptive most adequate plaintiff and should be appointed lead plaintiff.

D. Ohio Cannot Adequately Serve As Lead Plaintiff

Ohio has asserted that due to its experience as lead plaintiff in the extant securities

^{/16} See also *South Ferry LP #2 v. Killinger*, CV 04-1599C, slip op. at 1 (W.D. Wash. Nov. 30, 2004) (attached as Exhibit H to Charrow Decl. 2) (appointing German asset manager as lead plaintiff); *Curtis v. BEA Systems, Inc.*, No. C 04-2275 SI, slip op. at 1 (N.D. Cal. Sept. 24, 2004) (attached as Exhibit I to Charrow Decl. 2) (appointing Italian mutual fund manager as sole lead plaintiff); *Conway Inv. Club v. Corinthian Colls., Inc.*, No. 2:04-cv-05025, slip op. at 1 (C.D. Cal. Sept. 7, 2004) (attached as Exhibit J to Charrow Decl. 2) (appointing German asset manager as sole lead plaintiff); *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. 5:03CV2166, slip op. at 10 (N.D. Ohio May 12, 2004) (attached as Exhibit K to Charrow Decl. 2) (appointing Austrian fund manager as sole lead plaintiff and rejecting attacks based on fund’s foreign domicile as “unsupportable”); *Vangsgard v. ARIBA, Inc.*, No. C-03-00277 JF, slip op. at 10-11 (N.D. Cal. July 11, 2003) (attached as Exhibit L to Charrow Decl. 2) (appointing Italian mutual fund manager as sole lead plaintiff); *In re Turkcell Iletisim Hizmetler, A.S. Securities Litigation*, 209 F.R.D. 353, 361 (S.D.N.Y. 2002) (appointing foreign institution as sole lead plaintiff); *Newman v. Eagle Bldg. Techs.*, 209 F.R.D. 499, 505 (S.D. Fla. 2002) (appointing foreign plaintiff as lead plaintiff finding “[T]he emphasis that the opposing lead plaintiffs place on the fact that the [lead plaintiff movants] are located in Europe is of little significance.”); *In re Versata, Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 24270, at *23-24 (N.D. Cal. Aug. 17, 2001) (appointing Swiss investment firm and Mexican institution as lead plaintiffs); *Bell v. Ascendant Solutions*, No. 3:01-CV-0166-P, 2002 U.S. Dist. LEXIS 6850, at *16-17 (N.D. Tex. Apr. 17, 2002) (appointing group of plaintiffs from Israel, Germany and United States as lead plaintiffs, finding inclusion of foreign plaintiffs “helps create balance among the demographics of the lead plaintiff group members, and improves diversity of experience”).

litigation against the Federal Home Loan Mortgage Corporation (“Freddie Mac”), it has the requisite expertise to act as lead plaintiff in the current litigation against Freddie Mac’s statutory competitor, Fannie Mae. *See In Re Fed. Home Loan Mortgage Corp. Sec. & Der. Litig.*, MDL-1584 (S.D.N.Y.). The truth is that Ohio’s status as lead plaintiff in the Freddie Mac litigation, as well as its unique relationship as a State actor with Fannie Mae, not only makes Ohio an atypical representative in this matter, but also one with inherent conflicts which counsel against lead plaintiff status. Fannie Mae and Freddie Mac compete with one another and suffer from different alleged legal infirmities – one stands accused of overstating income, the other of understating income. Establishing the same lead plaintiff to craft equitable remedies for these vying institutions would, for several reasons, ill-serve the profoundly different interests and classes at issue. This is especially so here where Congress went out of its way to create two independent entities to compete in the same sector. *See* 12 U.S.C. § 4602(b)(4) (requiring a study to ascertain, among other things, the impact on competition in the second mortgage markets should the government repeal Freddie Mac and Fannie Mae’s congressional charters). In a myriad of ways, a common lead plaintiff subverts this congressional intent.

Litigation under the PSLRA is designed to recompense stockholders for losses occasioned by inappropriate corporate activity and to compel the corporation to adopt rules of governance to ensure that similar transgressions do not recur. Balancing the equitable against the monetary is difficult in the context of litigation but more difficult in the context of settlement where there might be a temptation to trade a larger settlement for less prophylaxes. Designating Ohio to serve as lead plaintiff in both the Fannie Mae and Freddie Mac cases would compound the potential for improper trade-offs with overlapping but significantly differing classes, to say

nothing of the potential for “cookie cutter” remedies to settle both litigations. The two suits also appear to be significantly different. Specifically, as the Court recognized in *Brendsel v. Office of Federal Housing Enterprise Oversight*, 339 F. Supp. 2d 52, 56 (D.D.C. 2004), “there might have been a significant understatement of income” that based on the allegations in the PSLRA suit and according to the complaint, “Freddie Mac issued restated financials for 2000, 2001, and 2002 reflecting [a] net increase of five billion dollars in income.” Freddie Mac’s alleged accounting problems – a combination of mistakes and efforts to build a reserve for bad times – had actually lowered its pretax profits by billions in 2002 and in earlier years. While Freddie Mac’s profits were understated, Fannie Mae’s were overstated by nearly \$9 billion. In short, a remedy that might preclude understating income might not be effective in combating overstating income. The stockholders of both Freddie Mac and Fannie Mae will be ill-served by a “one size fits all” approach and such a result is significantly more likely when a single plaintiff is lead in both suits.

A more pernicious problem, though, goes to the business relationships between Ohio and Fannie Mae. These relationships are necessarily atypical in that only States and other governmental entities are eligible to enter into partnerships with Fannie Mae, and Ohio has a number of these partnerships. The value to Ohio of those ongoing business relationships and of the Fannie Mae debt securities held by Ohio is inversely proportional to the size of any judgment against Fannie Mae – whether by settlement or through trial.

For example, in 2002, Ohio Treasurer Joseph T. Deters announced “a new partnership with the Ohio Housing Finance Agency [“OHFA”] and Fannie Mae.” Press Release from Ohio Treasurer (July 31, 2002) (attached as Exhibit M to Charrow Decl. 2). Under the fifty to one

hundred million dollar program, lenders would make home loans available at up to 1/2 percent below conventional mortgage rates; Fannie Mae would then purchase those mortgages and issue “mortgage-backed securities” which would then “be purchased by the Treasurer’s Office as investments” *Id.* Those mortgage-backed securities are guaranteed by Fannie Mae. *See* 12 CFR part 1720, Appendix B (Purpose – A.1.). As such, if Fannie Mae’s equity-side were to decrease dramatically as a result of an adverse judgment, the value of the guaranteed mortgage-backed securities would also decline. This inherent conflict is atypical because it is not the outgrowth of normal equity acquisition on the open market, but rather the result of complex and private business-partnership relationships between Ohio and Fannie Mae that make lead plaintiff status inappropriate in this case.

CONCLUSION

For the foregoing reasons, Cominvest respectfully requests this Court to: (a) appoint it as lead plaintiff; (b) approve Schiffrin & Barroway, LLP as lead counsel for the Class; and (c) approve Greenberg Traurig LLP as liaison counsel for the Class.

Dated: December 10, 2004

Respectfully submitted,

GREENBERG TRAURIG LLP

By



Joe R. Reeder (DC #279786)

Robert P. Charrow (DC #261958)

Geoffrey J. Greeves (DC #463035)

800 Connecticut Avenue, N.W., Suite 500

Washington, DC 20006

Telephone: (202) 331-3100

Facsimile: (202) 331-3101

greevesg@gtlaw.com

- and -

Hal M. Hirsch
Allen G. Kadish
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: (212) 801-9200
Facsimile: (212) 801-6400

Proposed Liaison Counsel

SCHIFFRIN & BARROWAY, LLP

Richard S. Schiffrin
Stuart L. Berman
Darren J. Check
Sean M. Handler
Robin Winchester
Three Bala Plaza East, Suite 400
Bala Cynwyd, PA 19004
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Proposed Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law in Supporting Cominvest Asset Management GmbH's Motion to Consolidate Actions, to be Appointed Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel and Liaison Counsel, and in Opposition to Competing Lead Plaintiff Motions was served on the following by first-class mail, postage prepaid:

Nelson Genshaft, Esq.
STRIP HOPPERS, et al.
575 South Third Street
Columbus, OH 43215

Michael Barrett, Esq.
BARRETT & WEBER
105 East Fourth Street, Suite 500
Cincinnati, OH 45202

Alan Statman, Esq.
STATMAN HARRIS, et al.
2900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202

David Scott, Esq.
SCOTT & SCOTT, LLC
108 Norwich Avenue
P.O. Box 192
Colchester, CT 06415

Arthur Shingler, Esq.
SCOTT & SCOTT, LLC
401 B Street, Suite 307
San Diego, CA 92101

Samuel Rudman, Esq.
LERACH COUGHLIN, et al.
200 Broadhollow Road, Suite 406
Melville, NY 11747

William Lerach, Esq.
LEACH COUGHLIN, et al.
401 B Street, Suite 1700
San Diego, CA 92101

Kevin Downey, Esq.
WILLIAMS & CONNELLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

Edward Horahan, III, Esq.
DECEHERT LLP
1775 Eye Street, N.W.
Washington, DC 20006

David Krakoff, Esq.
MAYER BROWN, et al.
1909 K Street, N.W.
Washington, DC 20006

Seth Aronson, Esq.
O'MELVENY & MYERS LLP
400 South Hope Street, 15th Floor
Los Angeles, CA 90071

and by overnight mail on:

Stuart Berman, Esq.
Sean Handler, Esq.
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East, Suite 400
Bala Cynwyd, PA 19004

Curtis Trinko, Esq.
LAW OFFICES OF CURTIS V. TRINKO, LLP
16 West 46th Street
New York, NY 10036

Alfred Yates, Jr., Esq.
LAW OFFICES OF ALFRED G. YATES, JR.
519 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15233

Janet DeCosta, Esq.
JANET K. DECOSTA, P.C.
1919 Pennsylvania Avenue
Washington, DC 20006

Stanley Chesley, Esq.
WAITE SCHENIDER, et al.
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202

Jeffrey Block, Esq.
BERMAN DEVALERIO, et al.
One Liberty Square
Boston, MA 02109

Steven J. Toll, Esq.
COHEN MILSTEIN, et al.
1100 New York Avenue, N.W.
West Tower - Suite 500
Washington, DC 20005

and was delivered electronically to all parties who participate and are registered with the electronic court filing (ECF System).



Geoffrey J. Greeves

FILED

DEC 29 2004

Phil Lombardi, Clerk
U.S. DISTRICT COURTIN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

WILLIAMS SECURITIES LITIGATION
WMB SUBCLASS
WCG SUBCLASS

Case No. 02-CV-72-H (M) ✓

ENTERED ON DOCKET

DATE DEC 30 2004

REPORT AND RECOMMENDATION

The undersigned previously issued a Report and Recommendation which recommended the appointment of the Ontario Teachers' Pension Plan Board and the Arkansas Teachers Retirement System (Teachers Pension Group) as Lead Plaintiff for the WMB subclass and recommended approval of its choice of counsel as Lead Counsel. [Dkt. 616]. Thereafter, the Court received the objection of Plaintiff Fredric E. Russell Investment Management Co. (Russell) and granted Russell's application to supplement its reply brief. In addition, the Court ordered the Teachers Pension Group to file a response to Russell's Supplemental Reply and recommitted the matter of the appointment of Lead Plaintiff to the undersigned United States Magistrate Judge. [Dkt. 634].

Additional briefs have been filed and in making this Report and Recommendation, the undersigned has fully considered the "Supplement to Reply Brief of Fredric E. Russell Investment Management Co. Inc. to R&R Docketed November 18, 2004" [Dkt. 636]; the "Response of the Ontario Teachers' Pension Plan Board and the Arkansas Teacher Retirement System to Fredric E Russell Investment Management's Submission regarding Ontario Teachers' Stock Holdings" [Dkt. 635]; the "Response Brief of the Ontario Teachers' Pension Plan Board and the Arkansas Teacher Retirement System Pursuant to The

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Court's December 16, 2004 Order: [Dkt. 638]; and "Reply Brief of Fredric E. Russell Investment Management Co. to the Court's Order of December 16, 2004" [Dkt. 637].¹

The appointment of a lead plaintiff in a private securities action is governed by the detailed procedures set forth in the Private Securities Litigation Reform Act (PSLRA) which require the Court to determine which applicant is "most capable of adequately representing the interests of the class members." 15 U.S.C. § 78u-4(a)(3)(B). In determining which applicant should be named lead plaintiff, the Court must accept the presumption that the most adequate plaintiff in any private action is the person(s) who: (1) has either filed the complaint or made a motion in response to a notice; (2) in the determination of the Court, has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Under the PSLRA, the Court's determination of the "most adequate plaintiff" may be rebutted only upon proof that the presumptive lead plaintiff either: (1) will not fairly and adequately protect the interests of the class; or (2) is subject to unique defenses that render such plaintiff incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

These procedures were applied by the Court in the initial appointment of a lead Plaintiff [Dkt. 128] and by the undersigned in the Report and Recommendation which recommended the appointment of Teachers Pension Group as lead plaintiff [Dkt. 616]. The foregoing provisions of the PSLRA will also provide the framework for reconsideration of the lead plaintiff recommendation.

¹ It is peculiar to name a document a reply to a court order when nothing within the Order of December 16, 2004, required, requested, suggested or even permitted a reply by Russell.

The issue presented is whether the substantial stock ownership of Ontario Teachers in several of the underwriter defendants constitutes proof that the Teachers Pension Group will not fairly and adequately protect the interests of the class so as to rebut the statutory presumption imposed by the PSLRA that the Teachers Pension Group is the "most adequate plaintiff."² 15 U.S.C. § 78u-4(3)(B)(iii)(II).

Russell argues that because Ontario Teachers owns approximately \$300 million of stock in the underwriter defendants, Teachers Pension Group has a conflict of interest as lead plaintiff between vigorously prosecuting the underwriter defendants and protecting its own financial interests in the underwriter defendants.

Certainly this argument has some force and might well be persuasive in a case not governed by the PSLRA. However, based on the lead plaintiff provisions of the PSLRA, its legislative history, the observations of the Securities and Exchange Commission (SEC), and the cases addressing the issue, as hereafter discussed, the undersigned concludes that a plaintiff's substantial stock ownership in a defendant does not automatically disqualify the plaintiff from serving as lead plaintiff under the PSLRA. The undersigned

² A preliminary issue, which is properly reserved to the district judge, is whether Russell has waived any objection to the appointment of Teachers Pension Group as lead plaintiff based on Ontario Teachers stock ownership. Russell failed to assert Ontario Teachers stock ownership as an issue in the lead plaintiff proceedings before the magistrate judge or in its objections to the Report and Recommendation which recommended appointment of Teachers Pension Group as lead plaintiff. Thus the record clearly establishes that Russell failed to make a timely objection. Further, it is apparent that information concerning the stock ownership was available throughout the proceedings before the magistrate judge and therefore before objections were due. Based on these considerations, a strong argument can be made that in this lengthy, complicated case, late objections should not be permitted. This argument is strengthened by the fact that the objection is posed by Russell, a class member who is not the next most adequate plaintiff under the PSLRA and therefore would likely not be appointed lead plaintiff even if Teachers Pension Group were disqualified. Moreover, the late objection is posed by a class member who does not have any pending claims against the underwriter defendants.

further concludes that nothing peculiar to this case disqualifies Teachers Pension Group from serving as lead plaintiff under the PSLRA.

The parties have cited four reported cases dealing with similar issues in the PSLRA context and counsel for Teachers Pension Group has filed a declaration asserting that courts have appointed lead plaintiffs with substantial ownership interests in defendants in five ongoing cases under the PSLRA. In three of the four cases cited, courts have concluded that "huge," "major" or "significant" ownership interests in defendants do not preclude plaintiffs from serving as lead plaintiffs under the PSLRA. In the other case the court found, without providing any analysis of the PSLRA issue, that stock ownership in the defendant disqualified the presumptive lead plaintiff from serving in that capacity on claims against that defendant.³ Thus the weight of authority supports the appointment of Teachers Pension Group as Lead Plaintiff despite Ontario Teachers ownership of stock in the defendant underwriters.

In *In re Cendant Corporation Litigation*, 264 F.3d 201 (3rd Cir. 2001) (*Cendant II*) the Third Circuit considered whether a settlement should be set aside because the lead plaintiff continued to hold "huge amounts" of Cendant stock during settlement negotiations. *Id.* at 243. The Court upheld the settlement, reasoning that the conflict of interest argument was inconsistent with the lead plaintiff provisions in the PSLRA.

³ The one case seemingly supportive of Russell's position is *In re Cendant*, 182 F.R.D. 144 (D. N.J. 1998) (*Cendant I*). In that case the Court appointed a co-lead plaintiff to assert claims against Merrill Lynch because CalPERS, the presumptive lead plaintiff, held \$300 million stock in that company. Curiously, CalPERS was permitted to serve as lead plaintiff to assert claims against Cendant, although CalPERS continued to hold "huge amounts" of Cendant stock. *In re Cendant*, 264 F.3d 201, 243 (3rd Cir. 2001) (*Cendant II*).

[The conflict of interest] thesis is attractive. The problem with it is that Congress seems to have rejected it when it enacted the lead plaintiff provisions of the PSLRA. The Reform Act establishes a presumption that the class member "most capable of adequately representing the interests of class members" is the shareholder with the largest financial stake in the recovery sought by the class. 15 U.S.C. § 78u-4(a)(3)(B)(i) & (iii)(I). The plaintiff with the largest stake in a given securities class action will almost invariably be a large institutional investor, and the PSLRA's legislative history expressly states that Congress anticipated and intended that such investors would serve as lead plaintiffs. See S. Rep. No. 104-98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690 ("The Committee intends to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring the court to presume that the member of the purported class with the largest financial stake in the relief is the 'most adequate plaintiff.' "). We presume that Congress was aware that an institutional investor with enormous stakes in a company is highly unlikely to divest all of its holdings in that company, even after a securities class action is filed in which it is a class member.

By establishing a preference in favor of having such investors serve as lead plaintiffs, Congress must have thought that the situation present here does not inherently create an unacceptable conflict of interest. See *id.* ("The Committee believes that an institutional investor acting as lead plaintiff can, consistent with its fiduciary obligations, balance the interests of the class with the long-term interests of the company and its public investors."). For this reason, the simple fact that the institutional investors who comprise Lead Plaintiff retained Cendant stock while the Settlement was negotiated is not nearly enough, standing alone, to support [the] claim that Lead Plaintiff was so conflicted that the Settlement should be overturned.

Cendant II, 264 F.3d at 243-244. [footnotes omitted].⁴

⁴ The *Cendant II* Court noted that although the matter was not before it, an issue of potential intra-class conflict may present a problem between the interests of those who purchase and hold stock in the defendant firm and those who purchased and sold stock in the defendant. The Court emphasized that the conflict was not one of identification of a lead plaintiff under the PSLRA, but of class configuration under Fed.R.Civ.P. 23. *Cendant II*, 264 F.3d at 244 n.25.

(continued...)

The undersigned has also found the following language concerning certification of a large pension plan with an equity position in defendant as class representative to be insightful:

More significant, from this court's perspective is the unequivocal policy position expressed by Congress when it passed the . . . [PSLRA] in 1995, demonstrat[ed] its intent that large institutional investors should be encouraged to serve as class representatives in securities fraud class actions. There can be no doubt that Congress understood that large institutional investors with multi-billion dollar portfolios would likely always hold equity investments in a broad spectrum of companies, some of which would likely be defendants in securities cases. As the legislative history of the PSLRA demonstrates, Congress found that "institutional investors are America's largest shareholders, with about \$9.5 trillion in assets, accounting for fifty-one percent of the equity market." Even if these equity investments are not held in named defendants, in this economy with intertwined business relationships of every kind, it is easy to foresee that a large damage award against one entity might negatively impact an equity position with another. If this condition were enough to defeat certification as a class representative, large institutional investors would almost invariably be disqualified; precisely the opposite of what Congress intended in passing PSLRA.

As the SEC has recently observed:

The standards for an adequacy challenge must be viewed in the context of the lead plaintiff provisions as a whole. . . . The largest financial interest requirement was itself designed to ensure more effective representation of investors in securities fraud class actions. Congress sought to encourage large investors, including institutions, to serve as lead plaintiffs, and

⁴ (...continued)

Throughout Russell's submissions it is suggested that appointment of the Teachers Pension Group presents problems of class certification. The undersigned has not attempted to address those contentions. Like the *Cendant II* Court, the undersigned sees the appointment of a lead plaintiff under the PSLRA and class certification under Rule 23 as separate issues. Class certification under Rule 23 is not before the Court at this point. Appointment of lead plaintiff under the PSLRA is. It is appropriate to take up class certification issues according to the case schedule upon full briefing of those issues.

believed that institutions could and would qualify as lead plaintiffs. The Commission believes that the standards for an adequacy challenge must not be read and applied in such a manner that they would nullify the largest financial interest requirement and defeat the purposes of the lead plaintiff provisions. . . . Thus, courts have recognized that generic arguments that would systematically disqualify large investors and institutions from serving as lead plaintiff should not suffice as "proof" [of inadequacy] under the statute.

The SEC Speaks in 1999: Office of The General Counsel Recent Judicial Developments, 1104 PLI/Corp 291, 484-85 (1999) (internal citations omitted).

This court finds that defendants' argument here, that FSBA should be disqualified because of the conflict between the members of the class and its pension beneficiaries, could be an argument against certifying almost all institutional-investors. This argument amounts to a "generic argument that would systematically disqualify large investors and institutions from serving as lead plaintiff." While there may be the occasional extreme case where a conflict of this type is too great and simply dominates the landscape too completely to ignore, in light of the policy behind that [sic] PSLRA, disqualification on this basis should be the exception rather than the rule. Accordingly, the court finds that FSBA, having taken all steps toward vigorously pursuing the claims against Vesta and Torchmark, is adequately representing the interests of the absent class members. Any speculation regarding potential conflicts of interest will not defeat FSBA's certification as a class representative.

In re Vesta Insurance Group, Inc., Securities Litigation, 1999 US Dist Lexis 22233 *28-32 (N.D. Ala. Oct. 25, 1999)(internal citations and footnotes omitted)(rejecting argument that a conflict existed between pension fund and members of the class where proposed class representative held a significant interest in a defendant company). See also *Perelli Armstrong Tire Corporation v. Labranch & Co., Inc.*, 2004 WL 1179311 *17 (S.D.N.Y.)(citing *Cendant II* and concluding that in enacting the PSLRA lead plaintiff

provisions which anticipate and intend that large institutional investors will serve as lead plaintiff, Congress rejected the thesis that ownership of stock in a defendant creates an inherent and unacceptable conflict of interest).

In contrast to the reasoned analysis provided in the above-cited cases, in *In re Cendant*, 182 F.R.D. 144 (D. N.J. 1998) (*Cendant I*), which Russell asserts requires disqualification of the Teachers Pension Group [Dkt. 637, p. 4], the Court compared the presumptive lead plaintiff's \$300 million investment holdings in the Defendant to its alleged loss of \$6.4 million and, without providing any analysis of the PSLRA, stated that "[t]he Court simply does not believe nor find that the [presumptive lead plaintiff] can overcome this substantial conflict of interest and fully protect the [class] interests." *Id.* at 149. The undersigned is not persuaded that merely making a comparison between the stock holdings and losses is particularly instructive.

An investment of \$300 million is undoubtedly substantial. However, to put the \$300 million in context, that figure should be compared to Ontario Teachers' net assets of \$80 billion (CND). According to the currency converter found at the Bank of Canada web site, <http://www.bank-banque-canada.ca/en/exchform.htm>, as of noon December 29, 2004, \$1 Canadian equaled \$.82 US. At that rate, \$80 billion (CND) is approximately \$65.6 billion US. So, in American dollars, \$300 million constitutes roughly .457% of Ontario Teachers entire net assets.

There are myriad factors which may affect Ontario Teachers holdings in the underwriter defendants. Nothing has been presented to demonstrate or predict the potential outcome of this litigation on those holdings. Further, nothing has been presented

to suggest that this lawsuit places the entirety of Ontario Teachers holdings in the underwriter defendants at risk, so the potential effect this lawsuit will have on Ontario Teachers net assets is likely far smaller than the .457% of its net assets represented by its holdings in the underwriter defendants. Under these circumstances, it is conjecture that decisions made in this case will be driven by Ontario Teachers' consideration of the uncertain effect decisions made in this case may have on its holdings in the underwriter defendants. In sum, the undersigned finds that the connection between Ontario Teachers decision making as lead plaintiff in this case and the effect those decisions may have on its holdings in the underwriter defendants is just too far attenuated to constitute the necessary proof that Ontario Teachers will fail to fairly and adequately protect the interests of the class.

In addition to the foregoing, the undersigned is persuaded that the alleged conflict of interest does not disqualify Ontario Teachers from serving as lead plaintiff. Ontario Teachers purchased its WMB shares on the open market, as apparently did Russell. It is named plaintiffs Local 710 and Gary Kossoff who have standing to assert claims against the underwriters. Notably, neither Local 710 nor Gary Kossoff have asserted any objection to the appointment of the Teachers Pension Group as Lead Plaintiff, in fact both have endorsed the appointment. [Dkt. 623, 626]. Further none of the other parties who sought to be named as lead plaintiff, and who have losses far greater than that alleged by Russell,⁵ and would therefore be next in line for appointment as lead plaintiff, have expressed any objection to the appointment of Ontario Teachers or Teachers Pension

⁵ Williams' Institutional Investors Groups has a loss of \$7.59 million and Pace Coalition has a loss of \$5.0 million, compared to Russell's loss of \$2.0 million.

Group as Lead Plaintiff. In addition, Ontario Teachers has filed a declaration pledging to "vigorously pursue" claims against the underwriter defendants to achieve the best possible result for all investors in the WMB Subclass. [Dkt. 638; Ex. A, ¶ 3]. And, finally, as Lead Plaintiff the Teachers Pension Group will be acting under the watchful eyes of the other Plaintiffs and the Court.

Having fully considered the matter, the undersigned finds that the objections raised in Russell's Supplemental Reply Brief [Dkt. 636] provide no basis for changing the Report and Recommendation filed November 17, 2004, [Dkt. 616]. A substantial investment in a defendant does not automatically rebut the lead plaintiff presumption of the PSLRA. As phrased in *Vesta*, the issue is whether the case before the Court is "the occasional extreme case where a conflict of this type is too great and simply dominates the landscape too completely to ignore." *Vesta*, 1999 U.S. Dist. Lexis 22233 * 31. The undersigned finds Russell has failed to prove that this is such a case. Russell has presented only conjecture, not proof, that the Ontario Teachers and the Teachers Pension Group will not fairly and adequately protect the interests of the class. Therefore the presumption that Teachers Pension Group is the most adequate plaintiff under the PSLRA has not been rebutted.

The undersigned also rejects Russell's contention that counsel have failed in their duty of candor to the Court. The Court did not request this information from applicants seeking to serve as lead plaintiff and there has been no citation to any rule or other authority suggesting that Ontario Teachers had any duty to disclose its stock holdings to the Court. Moreover, the information was publicly available.

The undersigned hereby RE-ADOPTS the Report and Recommendation filed November 17, 2004 [Dkt. 616] and RECOMMENDS that the Motion of the Ontario

Teachers' Pension Plan Board and the Arkansas Teacher Retirement System to Serve as Lead Plaintiffs for the WMB Subclass and For Approval of Their Selection of Counsel [Dkt. 592] be GRANTED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), a party may file specific written objections to this report and recommendation. The Court's Order of December 16, 2004 [Dkt. 634], directed that objections to this report and recommendation are be filed on an expedited basis. **In accordance with the Court's Order, specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma on or before January 6, 2005. Teachers Pension Group may also file a final brief on the issue by January 6, 2005. No further briefing will be permitted.**

If specific written objections are timely filed, Fed.R.Civ.P. 72(b) directs the district judge to:

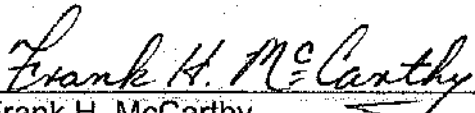
make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed.R.Civ.P. 72(b); see also 28 U.S.C. § 636(b)(1).

The Tenth Circuit has adopted a "firm waiver rule" which "provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of factual and legal questions." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Moore v. United States*, 950 F.2d

656, 659 (10th Cir. 1991)). Only a timely specific objection will preserve an issue for de novo review by the district court or for appellate review.

DATED this 29th day of December, 2004.


Frank H. McCarthy
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 30 Day of December, 2004 11:02

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 2004

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE: WILLIAMS SECURITIES LITIGATION

Case No. 02-CV-72-H(M)

(Lead Case)

This Document Relates To: WMB Subclass

Judge Sven Erik Holmes

**SUPPLEMENT TO REPLY BRIEF OF FREDRIC E. RUSSELL INVESTMENT
MANAGEMENT CO. INC. TO R&R DOCKETED NOVEMBER 18, 2004**

Late in the afternoon of December 13, 2004, counsel for Russell discovered what appears to be a massive undisclosed conflict of interest of Ontario Teachers. Ontario Teachers is required to file Schedule 13F-HR with the Securities and Exchange Commission for each quarter. Ontario Teachers' Schedule 13F-HR filed October 26, 2004 (two days before it applied to be lead plaintiff in this case), attached hereto as Exhibit A, shows Ontario Teachers, at September 30, 2004, owned \$281 million worth of stock in Bank of America, Citigroup, Goldman, Sachs, Merrill Lynch and CIBC, each of which is a key defendant in this case, as of September 30, 2004. At the close of the NYSE on December 13, 2004, the market value of the stock holdings of Ontario Teachers in those five Underwriters, assuming the same number of shares is still owned by them, is \$296 million¹.

The original application of Ontario Teachers to be lead plaintiff in this case, filed October 28, 2004, alleges losses in WMB common stock of \$23.6 million. \$296 million is 12.5 times the \$23.6 million in alleged WMB losses. If these shares in Defendants are now in their portfolio, Ontario Teachers both has a profound conflict of interest and Ontario Teachers and its counsel have not met required standards of candor with the Court, providing yet additional reasons why Ontario Teachers and its counsel are unable to fairly and adequately represent the interests of the WMB Subclass.

¹ Review of a number of Ontario Teachers' prior Schedule 13F-HRs reveals substantial investment in more than one of the Underwriter Defendants, raising the inference that at least much of the holdings as of September 30, 2004 are held today.

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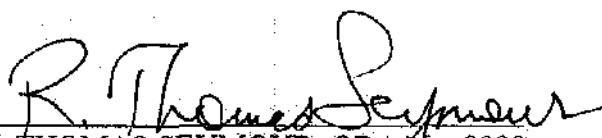
c/s

At 12-31-03, Ontario Teachers' website says it owned \$75 million worth of stock of UBS, also a defendant in this case. UBS does not appear in the holdings declared on Ontario Teachers' Schedule 13F-HRs, perhaps because disclosure of that Swiss stock is not required by the SEC. If \$75 million worth of UBS stock is owned by Ontario Teachers, that brings the total dollar amount of investment in Defendants to \$371 million, more than 15 times the claimed loss in WMB shares.

By contrast, Russell owns no shares in any of the Underwriter Defendants.

Needless to say, this stock ownership issue bears investigation. We do not know whether the Court prefers to deal with the matter itself or prefers to have Russell conduct discovery limited to this subject, by document request, interrogatory, or Rule 30(b)(6), Fed.R.Civ.P., deposition.

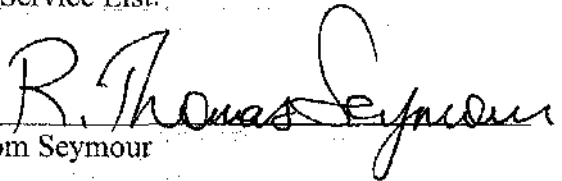
Respectfully submitted,


R. THOMAS SEYMOUR, OBA No. 8099
C. ROBERT BURTON, OBA No. 14195
SCOTT A. GRAHAM, OBA No. 19817
SEYMOUR LAW FIRM
100 West Fifth, Suite 550
Tulsa, OK 74103-4288
Telephone: (918)583-5791
Facsimile: (918) 583-9251

**COUNSEL FOR THE WMB SUBCLASS
AND FREDRIC E. RUSSELL
INVESTMENT MANAGEMENT CO**

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was served via e-mail the ^{17th}~~14th~~ day of December, 2004, to all counsel listed on the Master Service List.


Tom Seymour

Service List as of December 3, 2004; 8:30 A.M. CST

**MASTER SERVICE LIST FOR DEFENDANTS
WMB SUBCLASS, WCG SUBCLASS AND ERISA LITIGATION**

COUNSEL FOR WCG DEFENDANTS THE WILLIAMS COMPANIES, INC. AND KEITH BAILEY; FOR WMB DEFENDANTS THE WILLIAMS COMPANIES, AND DIRECTOR DEFENDANTS BAILEY, MALCOLM, MCCARTHY, BELITZ, AND HOBBS	
<p>Graydon Dean Luthey, Jr., Esq. OBA #5568 Sarah Jane Gillett, Esq., OBA #17099 Jennifer E. Mustain, Esq., OBA #13943 HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C. 320 South Boston Avenue, Suite 400 Tulsa, Oklahoma 74103-3708 Telephone: (918) 594-0400 Facsimile: (918) 594-0505 dluthey@hallestill.com sgillett@hallestill.com jmustain@hallestill.com</p>	<p>Timothy K. Roake, Esq. Sally J. Berens, Esq. Courtney Greene Power, Esq. GIBSON, DUNN & CRUTCHER, L.L.P. 1881 Page Mill Road Palo Alto, CA 94304 Telephone (650) 849-5300 Facsimile (650) 849-5333 troake@gibsondunn.com sberens@gibsondunn.com cpower@gibsondunn.com</p>
<p>Alex A. Goldberg, Esq., OBA #18523* THE WILLIAMS COMPANIES, INC. One Williams Center, 41st Floor P. O. Box 2400, MD 41-3 Tulsa, OK 74102 Telephone (918) 573-2000 Facsimile (918) 573-4195 alex.goldberg@williams.com</p> <p>* represents only The Williams Companies</p>	<p>Ethan D. Dettmer, Esq. GIBSON, DUNN & CRUTCHER, LLP One Montgomery Street, Suite 3100 San Francisco, CA 94104 Telephone (415) 393-8200 Facsimile (415) 986-5309 edettmer@gibsondunn.com</p>
<p>Darren L. McCarty, Esq. GIBSON, DUNN & CRUTCHER, LLP 2100 McKinney Avenue, Suite 1100 Dallas, Texas 75201 Telephone (214) 698-3100 Facsimile (214) 698-3400 dmccarty@gibsondunn.com</p>	<p>Wayne W. Smith, Esq. Meryl L. Young, Esq. Jeffrey H. Reeves, Esq. GIBSON, DUNN & CRUTCHER, LLP 4 Park Plaza, Suite 1400 Irvine, California 92614-8557 Telephone (949) 451-3800 Facsimile (949) 451-4220 wsmith@gibsondunn.com myoung@gibsondunn.com jreeves@gibsondunn.com</p>

Service List as of December 3, 2004; 8:30 A.M. CST

COUNSEL FOR WMB WILLIAMS OUTSIDE DIRECTOR DEFENDANTS COX, HOWELL, LEWIS, MEINIG, LILLIS, PARKER, WILLIAMS, CRUIKSHANK, CHAPMAN, GREEN, MACINNIS, STONEY, AND LORCH

Vance L. Beagles, Esq.
 Ralph I. Miller, Esq.
 Lori Browne, Esq.
WEIL, GOTSHAL AND MANGES
 200 Crescent Court, Suite 300
 Dallas, TX 75201
 Telephone (214) 746-7700
 Facsimile (214) 746-7777
 vance.beagles@weil.com
 ralph.miller@weil.com
 lori.browne@weil.com

COUNSEL FOR WMB AND WCG DEFENDANT ERNST & YOUNG

Patrick M. Ryan, Esq.
 Phillip G. Whaley, Esq.
 Timothy J. Bomhoff, Esq.
RYAN, WHALEY, COLDIRON & SHANDY
 119 N. Robinson, Suite 900
 Oklahoma City, OK 73102-8865
 Telephone: (405) 239-6040
 Facsimile: (405) 239-6766
 pryan@ryanwhaley.com
 pwhaley@ryanwhaley.com
 tbomhoff@ryanwhaley.com

Miles N. Ruthberg, Esq.
 Jamie L. Wine, Esq.
 Ethan Brown, Esq.
 Charles W. Cox, Esq.
LATHAM & WATKINS LLP
 633 West Fifth Street, Suite 4000
 Los Angeles, CA 90071
 Telephone: (213) 485-1234
 Facsimile: (213) 891-8763
 miles.ruthberg@lw.com
 jamie.wine@lw.com
 ethan.brown@lw.com
 chuck.cox@lw.com

COUNSEL FOR WMB UNDERWRITER DEFENDANTS

Jonathan M. Hoff, Esq.
 Riche McKnight, Esq.
CADWALADER, WICKERSHAM & TAFT LLP
 100 Maiden Lane
 New York, NY 10038
 Telephone (212) 504-6000
 Facsimile (212) 504-6666
 jonathan.hoff@cwtf.com
 riche.mcknight@cwtf.com

Warren Bickford, Esq.
 Burck Bailey, Esq.
 Brooks Richardson, Esq.
 John B. Heatly, Esq.
FELLERS SNIDER BLANKENSHIP BAILEY & TIPPENS
 100 N. Broadway, Suite 1700
 Oklahoma City, OK 73102
 Telephone: (405) 232-0621
 Facsimile: (405) 232-9659
 wbickford@fellerssnider.com
 bbailey@fellerssnider.com
 brichardson@fellerssnider.com
 jheatly@fellerssnider.com

Service List as of December 3, 2004; 8:30 A.M. CST

COUNSEL FOR WCG DEFENDANTS JANZEN, SCHUBERT, KINNEAR, BROSS, MCCOY, KALIKA, BUMGARNER AND SEMPLE AND WMB DEFENDANT BUMGARNER	
James L. Kincaid, Esq. Michael J. Gibbens, Esq. Victor E. Morgan, Esq. Susan E. Huntsman, Esq. CROWE & DUNLEVY, P.C. 321 S. Boston Avenue, Suite 500 Tulsa, OK 74103-3313 Telephone (918) 592-9800 Facsimile (918) 592-9801 kincaidj@crowedunlevy.com gibbensm@crowedunlevy.com morganv@crowedunlevy.com huntsmas@crowedunlevy.com	Jennifer Blankenship, Esq. CROWE & DUNLEVY, P.C. 20 North Broadway, Suite 1800 Oklahoma City, OK 73102 Telephone (405) 235-7700 Facsimile (405) 272-5958 blankenj@crowedunlevy.com
ERISA - BENEFITS AND INVESTMENT COMMITTEE DEFENDANTS' COUNSEL	
Laurence L. Pinkerton, Esq. PINKERTON & FINN, P.C. 15 East 5th Penthouse Suite Tulsa, OK 74103 Telephone: (918) 587-1800 Facsimile: (918) 582-2900 pf@att.net	Paul J. Ondrasik, Jr., Esq. Michael Kail, Esq. Kevin Powers, Esq. STEPTOE AND JOHNSON 1330 Connecticut Ave, N.W. Washington, D.C. 20036 Telephone: (202) 429-3000 Facsimile: (202) 429-3902 pondrasik@steptoe.com mkail@steptoe.com kpowers@steptoe.com
ERISA - COUNSEL FOR DIRECTOR DEFENDANTS AND FOR NONPARTY THE WILLIAMS COMPANIES	
Howard Shapiro, Esq. Suzanne S. Dickey, Esq. Charles F. Seemann, III, Esq. PROSKAUER ROSE, LLP LL&E Tower 909 Poydras Street, Suite 1100 New Orleans, Louisiana 70112 Telephone: (504) 310-4088 Facsimile: (504) 310-2022 howshapiro@proskauer.com sdickey@proskauer.com cseemann@proskauer.com	Graydon Dean Luthey, Jr., Esq. Sarah Jane Gillett, Esq. HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C. 320 South Boston Avenue, Suite 400 Tulsa, Oklahoma 74103-3708 Telephone: (918) 594-0400 Facsimile: (918) 594-0505 dluthey@hallestill.com sgillett@hallestill.com

Service List as of December 3, 2004; 8:30 A.M. CST

MASTER SERVICE LIST FOR PLAINTIFFS
WMB SUBCLASS, WCG SUBCLASS AND ERISA LITIGATION

WMB PLAINTIFF COUNSEL AND ON BEHALF OF FREDRIC E. RUSSELL INVESTMENT MANAGEMENT CO.	WCG PLAINTIFFS' COUNSEL
<p>R. Thomas Seymour, Esq. C. Robert Burton, Esq. Scott A. Graham, Esq. SEYMOUR LAW FIRM 100 West 5th Street, Suite 550 Tulsa, Oklahoma 74103 Telephone: (918) 583-5791 Facsimile: (918) 583-9251 rtseymour1@aol.com robtburton@aol.com sgraham@seymourlawfirm.com jbyrne@seymourlawfirm.com</p>	<p>James R. Hicks, Esq. Ronald J. Saffa, Esq. MORREL WEST SAFFA CRAIGE & HICKS, INC. 5310 E. 31st Street, Suite 1100 Tulsa, Oklahoma 74135 Telephone: (918) 664-0800 Facsimile: (918) 663-1383 jim@law-office.com ron@law-office.com</p>
	<p>Kevin Yourman, Esq. Behram Parekh, Esq. Janine Sperandeo YOURMAN ALEXANDER & PAREKH 3601 Aviation Boulevard, Suite 3000 Manhattan Beach, CA 90266 Telephone: 310-725-6400 Facsimile: 310-725-6420 kyourman@yaplaw.com bparekh@yaplaw.com jsperandeo@yaplaw.com</p>
	<p>Steven G. Schulman, Esq. Joshua H. Vinik, Esq. Salvatore J. Graziano, Esq. Caroline Marshall, Esq. MILBERG WEISS BERSHAD & SCHULMAN LLP One Pennsylvania Plaza New York, NY 10119 Telephone: (212) 594-5300 Facsimile: (212) 868-1229 SSchulman@MilbergWeiss.com JVinik@MilbergWeiss.com SGraziano@MilbergWeiss.com CMarshall@MilbergWeiss.com</p>

Service List as of December 3, 2004; 8:30 A.M. CST

	<p>Leigh A. Parker, Esq. Karnit Daniel, Esq. WEISS & LURIE 10940 Wilshire Boulevard, 24th Floor Los Angeles, CA 90024 Telephone: (310) 208-2800 Facsimile: (310) 209-2348 lparker@wyca.com kdaniel@wyca.com</p>
WMB PLAINTIFF ONTARIO TEACHERS' PENSION PLAN BOARD & ARKANSAS TEACHER RETIREMENT SYSTEM COUNSEL	
<p>Michael Burrage, Esq. BURRAGE LAW FIRM First United Center, Suite 100 115 N. Washington P. O. Box 1727 Durant, OK 74702 Telephone: (580) 920-0700 Facsimile: (580) 920-0702 mburrage@burrage-law.com</p>	<p>Blair A. Nicholas, Esq. Alan Schulman, Esq. BERNSTEIN LITOWITZ BERGER & GROSSMAN, LLP 12544 High Bluff Drive, Suite 150 San Diego, CA 92130 Telephone: (858) 793-00700 Facsimile: (858) 793-0323 blairn@blbglaw.com alans@blbglaw.com</p>
	<p>Douglas M. McKeige, Esq. Avi Josefson, Esq. Gerald H. Silk, Esq. Chad Johnson, Esq. Javier Bleichmar, Esq. Roy Esh, Esq. Larry Silvestro, Esq. Stephen Floytlin, Esq. Mark Lebovitch, Esq. BERNSTEIN LITOWITZ BERGER & GROSSMAN, LLP 1285 Avenue of the Americas New York, NY 10029 Telephone: (212) 554-14000 Facsimile: (212) 554-1444 doug@blbglaw.com avi@blbglaw.com jerry@blbglaw.com chad@blbglaw.com Javier@blbglaw.com roy@blbglaw.com larry@blbglaw.com stephenf@blbglaw.com markl@blbglaw.com</p>
WMB PLAINTIFF PACE COUNSEL	
William Federman, Esq.	William S. Lerach, Esq.

Service List as of December 3, 2004; 8:30 A.M. CST

FEDERMAN & SHERWOOD 120 N. Robinson, Suite 2720 Oklahoma City, OK 73102 Telephone: (405) 235-1560 Facsimile: (405) 239-2112 wfederman@aol.com	Darren J. Robbins, Esq. Ramzi Abadou, Esq. LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP 401 B Street, Suite 1700 San Diego, CA 92101 Telephone: (619) 231-1058 Facsimile: (619) 231-7423 wsl@lerachlaw.com darrenr@lerachlaw.com ramzia@lerachlaw.com
WMB PLAINTIFF LOCAL 710 FUNDS COUNSEL	
Michael Behn, Esq. FUTTERMAN & HOWARD, CHTD. 122 South Michigan Avenue, Suite 1850 Chicago, Illinois 60603 Telephone: (312) 427-3600 Facsimile: (312) 427-1850 MBehn@FuttermanHoward.com	Ira M. Press, Esq. KIRBY MCINERNEY & SQUIRE, LLP 830 Third Avenue, 10th Floor New York, NY 10022 Telephone: (212) 371-6600 Facsimile: (212) 751-2540 ipress@kmslaw.com
WMB PLAINTIFF GARY KOSSEFF AND DAVID SCHULTZ (JOINDER RE LOCAL 710)	
Marvin L. Frank, Esq. MURRAY, FRANK & SAILER, LLP 275 Madison Avenue, Suite 801 New York, NY 10016 Telephone: (212) 682-1818 Facsimile: (212) 682-1892 mfrank@murrayfrank.com	
WMB PLAINTIFF STEELWORKERS PENSION TRUST COUNSEL	
William R. Grimm, Esq. BARROW & GRIMM, P.C. 610 S. Main, Suite 300 Tulsa, OK 74119 Telephone: (918) 584-1600 Facsimile: (918) 585-2444 grimm@bggg.com	Sherrie R. Savett, Esq. Michael T. Fantini, Esq. Phyllis M. Parker, Esq. BERGER & MONTAGUE, P.C. 1622 Locust Street Philadelphia, PA 19103 Telephone: (215) 875-3000 Facsimile: (215) 875-4636 ssavett@bm.net mfantini@bm.net pparker@bm.net

WMB PLAINTIFF WILLIAMS INSTITUTIONAL INVESTMENT GROUP COUNSEL

Service List as of December 3, 2004; 8:30 A.M. CST

<p>Donald M. Bingham, Esq. David Riggs, Esq. James Polan, Esq. RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS 502 West Sixth Tulsa, OK 74119 Telephone: (918) 587-3161 Facsimile: (918) 584-1603 don_bingham@riggsabney.com driggs@riggsabney.com jpolan@riggsabney.com</p>	<p>Jay W. Eisenhofer, Esq. Sidney Liebseman, Esq. Gregg S. Levin, Esq. GRANT & EISENHOFER P.A. Chase Manhattan Center 1201 North Market Street Wilmington, DE 19801 Telephone: (302) 622-7000 Facsimile: (302) 622-7100 jeisenhofer@gelaw.com glevin@gelaw.com sliebseman@gelaw.com</p>
<p>Stanley M. Grossman, Esq. Robert J. Axelrod, Esq. POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS LLP 100 Park Avenue New York, NY 10017 Telephone: (212) 661-1100 Facsimile: (212) 661-8665 smgrossman@pomlaw.com rjaxelrod@pomlaw.com</p>	<p>Vincent R. Cappucci, Esq. Stephen D. Oestreich, Esq. Robert N. Cappucci, Esq. ENTWISTLE & CAPPUCCI, LLP 299 Park Avenue, 14th New York, NY 10171 Telephone: (212) 894-7200 Facsimile: (212) 894-7272 vcappucci@entwistle-law.com soestreich@entwistle-law.com rcappucci@entwistle-law.com</p>
ERISA PLAINTIFFS' COUNSEL	
<p>John E. Dowdell, Esq. William W. O'Connor, Esq. NORMAN WOHLGEMUTH CHANDLER & DOWDELL 2900 Mid-Continent Tower Tulsa, OK 74103 Telephone: (918) 583-7571 Facsimile: (918) 584-7847 jed@nwcdlaw.com ww@nwcdlaw.com</p>	<p>Laurie B. Ashton, Esq. KELLER ROHRBACK National Bank Plaza 3101 North Central Avenue, Suite 900 Phoenix, Arizona 85012 Telephone: (602) 230-6347 Facsimile: (602) 248-2822 LAshton@KellerRohrback.com</p>
<p>Lynn Lincoln Sarko, Esq. Cari Campen Laufenberg, Esq. KELLER ROHRBACK, L.L.P. 1201 Third Ave., Suite 3200 Seattle, WA 98101-3052 Telephone: (206) 623-1900 Facsimile: (206) 623-3384 LSarko@KellerRohrback.com CLaufenberg@KellerRohrback.com</p>	<p>Marc I. Machiz, Esq. COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C. 1100 New York Ave., N.W. Suite 500, West Tower Washington, D.C. 20005 Telephone: (202) 408-4600 Facsimile: (202) 408-4699 MMachiz@CMHT.com MPeterson@CMHT.com</p>

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M2M 4H5

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4167305300

MAIL ADDRESS:

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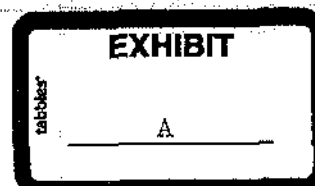
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 13F



FORM 13F COVER PAGE

Report for the Calendar Year or Quarter Ended: September 30, 2004

Check here if Amendment ☐; Amendment Number:This Amendment (Check only one.): ☐ is a restatement.☐ adds new holdings entries.

Institutional Investment Manager Filing this Report:

Name: Ontario Teachers' Pension Plan Board

Address: 5650 Yonge Street
Toronto, ON M2M 4H5

Form 13F File Number: 028-10597

The institutional investment manager filing this report and the person by whom it is signed hereby represent that the person signing the report is authorized to submit it, that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this submission.

Person Signing this Report on Behalf of Reporting Manager:

Name: Roger Barton

Title: Vice President, General Counsel & Secretary

Phone: 416.730.5321

Signature,
Roger BartonPlace,
Toronto, Ontarioand Date of Signing:
Tuesday, October 26, 2004Report Type (Check only one.): ☒ 13F HOLDINGS REPORT.☐ 13F NOTICE.☐ 13F COMBINATION REPORT.

List of Other Managers Reporting for this Manager:

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FORM 13F SUMMARY PAGE

Report Summary:

Number of Other Included Managers: 1

Form 13F Information Table Entry Total: 226

Form 13F Information Table Value Total (x\$1000): 6989246

List of Other Included Managers:

No.	13F File Number	Name
01	028-10596	Golden Apple Income Inc.

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FORM 13F INFORMATION TABLE

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VALUE SHARES/ SH/ PUT/ INVSTMT

NAME OF ISSUER	TITLE OF CLASS	CUSIP	(x\$1000)	PRN AMT	PRN CALL	DSCRETN
A D C TELECOMMUNICATIONS	COM	000886101	297	164000	SH	SOLE
ABB LTD	SPONSORED ADR	000375204	796	130000	SH	SOLE
ABBOTT LABS	COM	002824100	5757	135900	SH	SOLE
ABER DIAMOND CORP	COM	002893103	18966	550297	SH	SOLE
ABITIBI-CONSOLIDATED INC	COM	003924107	27890	4433932	SH	SOLE
ACCENTURE LTD BERMUDA	CL A	G1150G111	6281	232200	SH	SOLE
ADTRAN INC	COM	00738A106	454	20000	SH	SOLE
AGNICO EAGLE MINES LTD	COM	008474108	8378	589900	SH	SOLE
AGNICO EAGLE MINES LTD	*W EXP 11/07/20	008474132	331	105000	SH	SOLE
AGRIUM INC	COM	008916108	4446	250300	SH	SOLE
AKZO NOBEL NV	SPONSORED ADR	010199305	383	10800	SH	SOLE
ALBERTO CULVER CO	CL B CONV	013068101	2328	53550	SH	SOLE
ALCAN INC	COM	013716105	177198	3701836	SH	SOLE
ALCOA INC	COM	013817101	4948	147300	SH	SOLE
ALLERGAN INC	COM	018490102	1821	25100	SH	SOLE
ALLIANCE ATLANTIS COMMUNICAT	CL B NON-VTG	01853E204	7576	343428	SH	SOLE
ALLSTATE CORP	COM	020002101	28218	588000	SH	SOLE
ALTRIA GROUP INC	COM	02209S103	26535	564100	SH	SOLE
AMERICAN INTL GROUP INC	COM	026874107	33947	499300	SH	SOLE
AMGEN INC	COM	031162100	3922	69204	SH	SOLE
ANGIOTECH PHARMACEUTICALS IN	COM	034918102	15230	753096	SH	SOLE
APOLLO GOLD CORP	COM	03761E102	876	1075000	SH	SOLE
APPLIED MATLS INC	COM	038222105	541	32800	SH	SOLE
ATI TECHNOLOGIES INC	COM	001941103	41211	2687654	SH	SOLE
ATMEL CORP	COM	049513104	1852	511500	SH	SOLE
AVANEX CORP	COM	05348W109	78	38000	SH	SOLE
AXCAN PHARMA INC	COM	054923107	6961	448440	SH	SOLE
BALLARD PWR SYS INC	COM	05858H104	4886	661185	SH	SOLE
BANK MONTREAL QUE	COM	063671101	232076	5304173	SH	SOLE
BANK NEW YORK INC	COM	064057102	8503	291500	SH	SOLE
BANK NOVA SCOTIA HALIFAX	COM	064149107	263526	9014102	SH	SOLE
BANK OF AMERICA CORPORATION	COM	060505104	37059	855272	SH	SOLE
BARRICK GOLD CORP	COM	067901108	68107	3236086	SH	SOLE
BAXTER INTL INC	COM	071813109	3058	95100	SH	SOLE
BCE INC	COM	05534B109	243321	11285621	SH	SOLE
BEMA GOLD CORP	COM	08135F107	5025	1579766	SH	SOLE
BIOVAIL CORP	COM	09067J109	20446	1185405	SH	SOLE
BLYTH INC	COM	09643P108	2318	75000	SH	SOLE
BP PLC	SPONSORED ADR	055622104	1863	32375	SH	SOLE
BRASCAN CORP	CL A LTD VT SH	10549F606	22724	753239	SH	SOLE
BROOKFIELD PPTYS CORP	COM	112900105	19110	595183	SH	SOLE
CAE INC	COM	124765108	6005	1379934	SH	SOLE
CAMBIOR INC	COM	13201L103	5621	1845422	SH	SOLE
CAMECO CORP	COM	13321L108	30569	385013	SH	SOLE
CANADIAN NAT RES LTD	COM	136385101	139311	3486628	SH	SOLE
CANADIAN NATL RY CO	COM	136375102	102561	2096845	SH	SOLE
CANADIAN PAC RY LTD	COM	13645T100	35816	1384758	SH	SOLE
CANADIAN SUPERIOR ENERGY INC	COM	136644101	370	200000	SH	SOLE
CANWEST GLOBAL COMMUNICATION	SHS NON VTG	138906300	804	102965	SH	SOLE
CDN IMPERIAL BK OF COMMERCE	COM	136069101	204635	3822053	SH	SOLE
CELESTICA INC	SUB VTG SHS	15101Q108	20364	1603595	SH	SOLE
CHC HELICOPTER CORP	CL A SUB VTG	12541C203	8750	225705	SH	SOLE
CHEVRONTExaco CORP	COM	166764100	3690	68800	SH	SOLE
CIGNA CORP	COM	125509109	4164	59800	SH	SOLE
CISCO SYS INC	COM	17275R102	5111	282400	SH	SOLE
CITIGROUP INC	COM	172967101	34956	792300	SH	SOLE
COCA COLA CO	COM	191216100	8090	202000	SH	SOLE

COGNOS INC	COM	19244C109	30551	855791	SH	SOLE
COLGATE PALMOLIVE CO	COM	194162103	741	16400	SH	SOLE
COMPANHIA VALE DO RIO DOCE	SPON ADR PFD	204412100	3540	183900	SH	SOLE
CONOCOPHILLIPS	COM	20825C104	30932	373355	SH	SOLE
CORUS ENTERTAINMENT INC	COM CL B NON VT	220874101	7837	421488	SH	SOLE
COTT CORP QUE	COM	22163N106	18130	620992	SH	SOLE
CP SHIPS LTD	COM	22409V102	17302	1424639	SH	SOLE
CRANE CO	COM	224399105	2097	72500	SH	SOLE
CREO INC	COM	225606102	4566	554915	SH	SOLE
CRYSTALLEX INTL CORP	COM	22942F101	1599	480000	SH	SOLE
DARDEN RESTAURANTS INC	COM	237194105	4223	181100	SH	SOLE
DECOMA INTERNATIONAL INC	CL A SUB VTG	24359C100	533	65757	SH	SOLE
DEVRY INC DEL	COM	251893103	2189	105700	SH	SOLE
DIEBOLD INC	COM	253651103	2363	50600	SH	SOLE
DOMTAR INC	COM	257561100	4535	377056	SH	SOLE
DOREL INDS INC	CL B SUB VTG	25822C205	6496	230635	SH	SOLE
DOW CHEM CO	COM	260543103	5309	117500	SH	SOLE
DST SYS INC DEL	COM	233326107	2059	46300	SH	SOLE
ELDORADO GOLD CORP NEW	COM	284902103	8141	2515629	SH	SOLE
ENBRIDGE INC	COM	29250N105	52628	1260969	SH	SOLE
ENCANA CORP	COM	292505104	192025	4159390	SH	SOLE
ENERPLUS RES FD	UNIT TR G NEW	29274D604	6518	200000	SH	DEFINED 01
EXTENDICARE INC CDA	SUB VTG SH	30224T871	15236	1184292	SH	SOLE
EXXON MOBIL CORP	COM	30231G102	9908	205000	SH	SOLE
FAIRFAX FINL HLDGS LTD	SUB VTG	303901102	13274	106857	SH	SOLE
FAIRMONT HOTELS RESORTS INC	COM	305204109	13648	498542	SH	SOLE
FEDERAL NATL MTG ASSN	COM	313586109	21410	337700	SH	SOLE
FIRSTSERVICE CORP	SUB VTG SH	33761N109	1900	79794	SH	SOLE
FNX MNG CO INC	COM	30253R101	1899	375000	SH	SOLE
FORDING CDN COAL TR	TR UNIT	345425102	724205	12974102	SH	DEFINED 01
FOUR SEASONS HOTEL INC	LTD VTG SH	35100E104	1632	25511	SH	SOLE
FOX ENTMT GROUP INC	CL A	35138T107	10267	370100	SH	SOLE
FRANCE TELECOM	SPONSORED ADR	35177Q105	813	32500	SH	SOLE
GAMMON LAKE RES INC	COM	364915108	1454	250000	SH	SOLE
GENERAL DYNAMICS CORP	COM	369550108	7882	77200	SH	SOLE
GENERAL ELEC CO	COM	369604103	3784	112700	SH	SOLE
GILDAN ACTIVEWEAR INC	SUB VTG SHS A	375916103	3321	117890	SH	SOLE
GLAMIS GOLD LTD	COM	376775102	19937	1076831	SH	SOLE
GOLDCORP INC NEW	COM	380956409	11017	795660	SH	SOLE
GOLDEN STAR RES LTD CDA	COM	38119T104	6624	1262700	SH	SOLE
GOLDMAN SACHS GROUP INC	COM	38141G104	2331	25000	SH	SOLE
GOODRICH CORP	COM	382388106	2666	85000	SH	SOLE
GROUPE CGI INC	CL A SUB VTG	39945C109	18210	2707658	SH	SOLE
GSI LUMONICS INC	COM	36229U102	5709	546674	SH	SOLE
HEWLETT PACKARD CO	COM	428236103	31387	1674000	SH	SOLE
HOME DEPOT INC	COM	437076102	7954	202900	SH	SOLE
HUB INTERNATIONAL LTD	COM	44332P101	1873	104030	SH	SOLE
HUBBELL INC	CL B	443510201	2779	62000	SH	SOLE
HUMMINGBIRD INC	COM	44544R101	3807	185016	SH	SOLE
IAMGOLD CORP	COM	450913108	11949	1492351	SH	SOLE
ID BIOMEDICAL CORP	COM	44936D108	3409	263700	SH	SOLE
IMAX CORP	COM	45245E109	421	75000	SH	SOLE
IMPERIAL OIL LTD	COM NEW	453038408	52765	1018473	SH	SOLE
INCO LTD	*W EXP 08/21/20	453258139	4013	237587	SH	SOLE
INCO LTD	COM	453258402	47744	1221527	SH	SOLE
INTEL CORP	COM	458140100	4012	200000	SH	SOLE
INTERNATIONAL BUSINESS MACHS	COM	459200101	10812	126100	SH	SOLE
INTERTAPE POLYMER GROUP INC	COM	460919103	1534	204103	SH	SOLE
INTIER AUTOMOTIVE INC	CL A	46115N104	726	35000	SH	SOLE
INTRAWEST CORPORATION	COM NEW	460915200	13249	697716	SH	SOLE

IPSCO INC	COM	462622101	24286	870296	SH	SOLE
IVANHOE ENERGY INC	COM	465790103	252	120625	SH	SOLE
IVANHOE MINES LTD	COM	46579N103	6542	1164500	SH	SOLE
J P MORGAN CHASE & CO	COM	46625H100	45689	1150000	SH	SOLE
JONES APPAREL GROUP INC	COM	480074103	5370	150000	SH	SOLE
KINDER MORGAN INC KANS	COM	49455P101	2287	36400	SH	SOLE
KINGSWAY FINL SVCS INC	COM	496904103	7605	580460	SH	SOLE
KINROSS GOLD CORP	COM NEW	496902206	25947	3826708	SH	SOLE
KROGER CO	COM	501044101	21728	1400000	SH	SOLE
LEAR CORP	COM	521865105	27595	306800	SH	SOLE
LEXMARK INTL NEW	CL A	529771107	2361	28100	SH	SOLE
LOCKHEED MARTIN CORP	COM	539830109	5288	94800	SH	SOLE
MAGNA INTL INC	CL A	559222401	79692	1075175	SH	SOLE
MANULIFE FINL CORP	COM	56501R106	317595	7245629	SH	SOLE
MARRIOTT INTL INC NEW	CL A	571903202	442	8500	SH	SOLE
MASONITE INTL CORP	COM	575384102	14476	575005	SH	SOLE
MBIA INC	COM	55262C100	3149	54100	SH	SOLE
MCDONALDS CORP	COM	580135101	6993	249500	SH	SOLE
MDS INC	COM	55269P302	17428	1136566	SH	SOLE
MEADWESTVACO CORP	COM	583334107	3413	107000	SH	SOLE
MEDTRONIC INC	COM	585055106	3041	58600	SH	SOLE
MERCANTILE BANKSHARES CORP	COM	587405101	3559	74200	SH	SOLE
MERCK & CO INC	COM	589331107	7484	226800	SH	SOLE
MEREDITH CORP	COM	589433101	2137	41600	SH	SOLE
MERIDIAN GOLD INC	COM	589975101	12684	763366	SH	SOLE
MERRILL LYNCH & CO INC	COM	590188108	1740	35000	SH	SOLE
METHANEX CORP	COM	59151K108	26774	1790484	SH	SOLE
MI DEVS INC	CL A SUB VTG	55304X104	9409	365237	SH	SOLE
MICROCHIP TECHNOLOGY INC	COM	595017104	3758	140000	SH	SOLE
MICROSOFT CORP	COM	594918104	12172	440200	SH	SOLE
MINEFINDERS LTD	COM	602900102	1788	259700	SH	SOLE
MIRAMAR MINING CORP	COM	60466E100	747	590000	SH	SOLE
MORGAN STANLEY	COM NEW	6174446448	1972	40000	SH	SOLE
NATIONAL SEMICONDUCTOR CORP	COM	637640103	3047	196700	SH	SOLE
NATIONWIDE FINL SVCS INC	CL A	638612101	5126	146000	SH	SOLE
NEUROCHEM INC	COM	64125K101	2139	125000	SH	SOLE
NEXEN INC	COM	65334H102	815241	19533318	SH	SOLE
NEXTEL COMMUNICATIONS INC	CL A	65332V103	4053	170000	SH	SOLE
NORANDA INC	COM	655422103	22100	1269669	SH	SOLE
NORTEL NETWORKS CORP NEW	COM	656568102	129241	38165410	SH	SOLE
NORTH FORK BANCORPORATION NY	COM	659424105	3627	81600	SH	SOLE
NORTHEAST UTILS	COM	664397106	3866	199400	SH	SOLE
NORTHERN TR CORP	COM	665859104	7785	190800	SH	SOLE
NORTHGATE EXPL LTD	COM	666416102	3985	2098500	SH	SOLE
NORTHROP GRUMMAN CORP	COM	666807102	6698	125600	SH	SOLE
NOVA CHEMICALS CORP	COM	66977W109	1876	48615	SH	SOLE
NOVAGOLD RES INC	COM NEW	66987E206	4094	650000	SH	SOLE
NUCOR CORP	COM	670346105	3015	33000	SH	SOLE
ORACLE CORP	COM	68389X105	812	72000	SH	SOLE
PAN AMERICAN SILVER CORP	COM	697900108	8152	477918	SH	SOLE
PARKER HANNIFIN CORP	COM	701094104	4709	80000	SH	SOLE
PETRO-CDA	COM	71644E102	123413	2372705	SH	SOLE
PETROKAZAKHSTAN INC	COM	71649P102	38732	1140843	SH	SOLE
PHELPS DODGE CORP	COM	717265102	4565	49600	SH	SOLE
PLACER DOME INC	COM	725906101	96631	4846500	SH	SOLE
POTASH CORP SASK INC	COM	73755L107	16973	264840	SH	SOLE
PRECISION DRILLING CORP	COM	74022D100	29554	514295	SH	SOLE
PRICE T ROWE GROUP INC	COM	74144T108	2099	41200	SH	SOLE
PROCTER & GAMBLE CO	COM	742718109	8118	150000	SH	SOLE
PROVIDENT ENERGY TR	TR UNIT	74386K104	153	17250	SH	DEFINED 01

PRUDENTIAL FINL INC	COM	744320102	5080	108000	SH	SOLE
QLT INC	COM	746927102	11303	683889	SH	SOLE
QUEBECOR WORLD INC	COM NON-VTG	748203106	14763	661683	SH	SOLE
RESEARCH IN MOTION LTD	COM	760975102	132756	1741650	SH	SOLE
ROGERS COMMUNICATIONS INC	CL B	775109200	46591	2301128	SH	SOLE
ROGERS WIRELESS COMMUNICATIO	CL B NON-VTG	775315104	6375	203665	SH	SOLE
ROYAL BK CDA MONTREAL QUE	COM	780087102	262523	5534665	SH	SOLE
ROYAL GROUP TECHNOLOGIES LTD	SUB VTG SH	779913107	4437	505247	SH	SOLE
SABRE HLDGS CORP	CL A	785905100	5274	215000	SH	SOLE
SARA LEE CORP	COM	803111103	7857	343700	SH	SOLE
SBC COMMUNICATIONS INC	COM	783876103	6851	264000	SH	SOLE
SCHLUMBERGER LTD	COM	806857108	3763	55900	SH	SOLE
SERVICE CORP INTL	COM	817565104	2484	400000	SH	SOLE
SHAW COMMUNICATIONS INC	CL B CONV	82028K200	27966	1674355	SH	SOLE
SIERRA WIRELESS INC	COM	826516106	4636	259600	SH	SOLE
SMTC CORP	COM	832682108	519	1442000	SH	SOLE
SPRINT CORP	COM FON GROUP	852061100	28772	1429300	SH	SOLE
STANLEY WKS	COM	854616109	4253	100000	SH	SOLE
STMICROELECTRONICS N V	NY REGISTRY	861012102	5410	313100	SH	SOLE
SUN LIFE FINL INC	COM	866796105	169310	5603336	SH	SOLE
SUNCOR ENERGY INC	COM	867229106	128697	4026237	SH	SOLE
SUNOCO INC	COM	86764P109	7398	100000	SH	SOLE
SYSCO CORP	COM	871829107	1831	61200	SH	SOLE
TALISMAN ENERGY INC	COM	87425E103	108439	4179822	SH	SOLE
TARGET CORP	COM	87612E106	3249	71800	SH	SOLE
TECO ENERGY INC	COM	872375100	8072	596600	SH	SOLE
TELESYSTEM INTL WIRELESS INC	COM NEW	879946606	11964	1254900	SH	SOLE
TELUS CORP	NON-VTG SHS	87971M202	10766	555416	SH	SOLE
TESCO CORP	COM	88157K101	1972	182984	SH	SOLE
TESMA INTL INC	CL A SUB VTG	881908107	5594	235608	SH	SOLE
TEXAS INSTRS INC	COM	882508104	5639	265000	SH	SOLE
TIME WARNER INC	COM	887317105	23091	1430700	SH	SOLE
TLC VISION CORP	COM	872549100	1596	183100	SH	SOLE
TORONTO DOMINION BK ONT	COM NEW	891160509	200077	5486606	SH	SOLE
TOTAL S A	SPONSORED ADR	89151E109	284	2780	SH	SOLE
TRANSALTA CORP	COM	89346D107	18463	1415151	SH	SOLE
TRANSCANADA CORP	COM	89353D107	82147	3754987	SH	SOLE
UNISYS CORP	COM	909214108	1708	165500	SH	SOLE
UNITED PARCEL SERVICE INC	CL B	911312106	410	5400	SH	SOLE
VASOCEN INC	COM	92232F103	337	75000	SH	SOLE
VERIZON COMMUNICATIONS	COM	92343V104	40077	1017700	SH	SOLE
VIACOM INC	CL B	925524308	14716	438500	SH	SOLE
VISHAY INTERTECHNOLOGY INC	COM	928298108	2187	169500	SH	SOLE
WESTERN SILVER CORP	COM	959531104	930	100000	SH	SOLE
WHEATON RIV MINERALS LTD	COM	962902102	19352	6161100	SH	SOLE
WHEATON RIV MINERALS LTD	*W EXP 05/30/20	962902177	2148	1112500	SH	SOLE
XCEL ENERGY INC	COM	98389B100	5196	300000	SH	SOLE
YAMANA GOLD INC	COM	98462Y100	4036	1569500	SH	SOLE
ZARLINK SEMICONDUCTOR INC	COM	989139100	2806	928431	SH	SOLE

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-----END PRIVACY-ENHANCED MESSAGE-----